87-1634

No. _____

In the
Supreme Court of the United States
October Term, 1987

PHOTOTRON CORPORATION,

Petitioner,

v.

EASTMAN KODAK COMPANY, FUQUA INDUSTRIES, INC., and COLORCRAFT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL R. SHULMAN
David M. Coyne
Quentin R. Wittrock
Gray, Plant, Mooty, Mooty & Bennett, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800

JOSEPH M. ALIOTO
Alioto & Alioto
Twenty-Third Floor
650 California Street
San Francisco, California 94108
Telephone: (415) 434-2100

RICHARD LEE BROWN
S. Gary Werley
Bishop, Payne, Lamsens & Brown
Eighteenth Floor
First Interstate Bank
One Burnett Plaza
Fort Worth, Texas 76102
Telephone: (817) 335-4911

Attorneys for Petitioner

1988 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518

QUESTIONS PRESENTED FOR REVIEW

1. Has this Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986), "undermined," as the court of appeals held, the "facially sensible proposition" that "the competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market"?

2. Does a competitor establish sufficient threatened "antitrust injury" to obtain a preliminary injunction under Sections 7 and 16 of the Clayton Act (15 U.S.C. §§ 18, 26) by showing that a proposed merger may tend to create a monopoly?

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Petitioner Phototron Corporation ("Phototron") respectfully prays this Court to issue a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit dated March 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on March 28, 1988, and is unreported. It is attached hereto as Appendix ("App.") A. The opinion of the United States District Court for the Northern District of Texas, granting

petitioner's motion for a preliminary injunction, was rendered on February 22, 1988, and is unreported. It is attached hereto as App. B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, reversing the district court's issuance of a preliminary injunction, was entered on March 28, 1988. Petitioner has timely filed this Petition for a Writ of Certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are quoted in App. E hereto: Clayton Antitrust Act §§ 7, 16, 15 U.S.C. §§ 18, 26.

STATEMENT OF THE CASE

This case presents the issue of whether a competitor has sufficient "antitrust injury" to obtain a preliminary injunction by showing that a proposed merger may tend to create a monopoly in the relevant market. Based on its reading of this Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986), the court of appeals in this case held that such a showing was not sufficient. "Bound by precedent" to "follow the Supreme Court's tracks" in *Cargill*, as it viewed them, the Fifth Circuit reversed the district court's grant of a preliminary injunction against a merger, because the petitioner failed to prove sufficient "antitrust injury." In so ruling, the court of appeals held, *inter alia*, that this Court's decision in *Cargill* has "undermined" the "facially sensible proposition" that "the competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." App. A., at A-7. If this interpretation of *Cargill* is correct, private enforcement of Sections 7 and 16 of the Clayton Act will be substantially impaired, if not eliminated.

Respondents Eastman Kodak Company ("Kodak") and Colorcraft Corporation ("Colorcraft"), by far the two largest wholesale photofinishers in the United States, have agreed to combine their operations. The resulting juggernaut will possess a market share of 66 to 85 percent, which the district court found likely to create a monopoly in violation of Section 7 of the Clayton Act.[1]

Respondents have built their monopoly by way of a merciless acquisition of former competitors. Two years ago, Kodak, which had agreed to divest its photofinishing monopoly under a 1954 consent decree, owned just 10 photofinishing laboratories. In December 1986, Kodak purchased Fox Photo ("Fox"), with 20 wholesale plants, many of which Fox had acquired through previous acquisitions. In October 1987, Kodak acquired American Photo Group ("APG"), with 20 additional plants. In the same time period, Kodak also acquired Qualis Photo Finishing Company ("Qualis") and CX Corporation ("CX"), bringing the total Kodak dynasty to 54 plants. Thus, in less than one year, Kodak increased its number of photofinishing laboratories more than five-fold. App. B, at A-16.

As the district court found, respondent Fuqua Industries, Inc. ("Fuqua") "has also demonstrated a proclivity for acquiring its competitors." App. B, at A-16. Fuqua bought Berkey Photo, Inc. ("Berkey"), once one of the largest photofinishers in the United States, in 1985.[2] In July 1987, Colorcraft bought Magnicolor Photo Labs ("Magnicolor"), which had six plants. Fuqua/Colorcraft now operates over 40 labs. App. B, at A-16–17.

The court of appeals' ruling, unless set aside, would facilitate a dramatic and ominous culmination to the mergers and acquisitions described above: where just three years ago Kodak and Colorcraft

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[1] The court of appeals did not disturb the district court's finding of a monopoly; it held that even if the merger will create a monopoly, Phototron lacks standing to challenge it. The district court also found that Phototron was likely to prevail on its claims that the proposed combination would violate Sections 1 and 2 of the Sherman Act.

[2] The acquisition of Berkey is both significant and ironic. A decade ago, Berkey waged an intense antitrust battle against Kodak. Now, if this combination is allowed to proceed, the once-fierce competitors will be working hand-in-hand. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

competed with Fox, APG, Qualis, CX, Berkey, Magnicolor, and each other, they today stand prepared to reign supreme as the only viable national entity in the wholesale photofinishing marketplace. App. B, at A-16.

Immediately after their merger, the respondents, by their own admission, intend to close at least 30 "overlapping" or "duplicative" plants[3] and fire[4] all "redundant" employees.

Another "menacing aspect" of the incipient merger is the leverage of Kodak's vertical integration, when joined with the sheer size of the combined entity. App. B, at A-27. Kodak already controls both the supply and the demand in the wholesale photofinishing industry. Kodak maintains at least an 80 percent market share of the color film used by amateur photographers, who deliver their exposed film to retailers, which in turn create the demand for wholesale photofinishing services. On the other side, Kodak likewise has a market share of at least 80 percent in color print paper and chemicals, the basic supplies used in providing wholesale photofinishing services. App. B, at A-17–19.

Kodak's vertical integration thus gives it a stranglehold on competing photofinishers. This stranglehold is tightened by the Kodak "Colorwatch" marketing program.[5] Under Colorwatch, which involves massive consumer advertising, Kodak controls both supply and demand by requiring participating retailers to send film for processing only to wholesale photofinishers that have agreed with Kodak to use exclusively Kodak photographic paper **and** chemicals **throughout an entire plant, i.e.,** for all customers. App. B, at A-18, 25.

By manipulating the price of paper and chemicals to photofinishers, Kodak can squeeze out its horizontal competitors, the few remaining wholesale photofinishers. App. B, at A-17–19.

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[3]Currently, another apt adjective for these plants is "competing."

[4]Defendants use the euphemism "rationalize" to describe what they will do to their people and plants.

[5]Phototron's complaint also challenges the legality of Colorwatch, but its preliminary injunction motion sought only to stop the imminent combination between Kodak and Colorcraft.

Petitioner is one of those dwindling few. In 1987, Phototron had annual sales of $40 million, making it one-eighth the size of either Kodak's or Colorcraft's photofinishing business.[6] Since Colorcraft joined the Colorwatch program in 1987, Phototron's annual sales have fallen by nearly half, to $22 million, as it has lost such major accounts as K-Mart and Kroger. In its verified complaint and the affidavit of its president, Phototron demonstrated that it has lost these accounts to Kodak and Colorcraft because of wholesale photofinishing prices that reflect either sales below cost or substantial discounts on Kodak paper and chemicals not made available to Phototron. App. B, at A-18–19, 23–24.

Respondents announced their proposed combination on December 7, 1987. Phototron filed this action on December 21, 1987, alleging jurisdiction in the district court under Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15, 26, and under 28 U.S.C. § 1337, and promptly moved for a preliminary injunction against the combination. By agreement, the district court heard the motion on affidavits, without discovery, on February 5, 1988. On February 22, it enjoined the merger in a memorandum opinion and order, which the court of appeals reversed on March 28.

In reversing the district court, the Fifth Circuit held that under *Cargill*, the district court erred "in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likelihood of **having suffered** an antitrust injury." App. A, at A-4 (emphasis added). The Fifth Circuit then made this determination for itself and concluded that Phototron had not demonstrated a likelihood of having already suffered an antitrust injury. App. A, at A-4–10.

Inter alia, the Fifth Circuit found:

> (1) Phototron had not alleged and proved pre-existing predatory pricing. App. A, at A-5–7.
>
> (2) Although Phototron established that the combination would tend to create a monopoly, "the notion that merely

[6] The district court found the sales of Kodak and Colorcraft to be approximately $300 million each. App. B, at A-17.

facing the specter of a monopoly is enough to create standing in a competitor is not the law." App. A, at A-7.

(3) Kodak's vertical integration and consequent ability to manipulate prices and other conditions affecting photofinishing supply and demand provided no basis for enjoining the combination, because "if Kodak is manipulating prices on the sale of its paper and chemicals to customers, then a price discrimination suit should be brought against Kodak, not against this merging entity." App. A, at A-10.[7]

REASONS FOR GRANTING THE PETITION

I. INTRODUCTORY STATEMENT

Phototron asks this Court to grant its petition in order to preserve the viability of private antitrust enforcement under Sections 7 and 16 of the Clayton Act, and to instruct the lower federal courts in the proper application of those statutes and this Court's decision in *Cargill*.

Here a private plaintiff preliminarily enjoined a clearly unlawful merger that would have allowed its competitors to obtain a

[7]In an extraordinarily brazen effort to frustrate both Phototron's rights to obtain review and relief in this Court, and this Court's powers to provide review and appropriate relief, respondents now claim that they have already consummated their combination, by certain actions begun on March 29, 1988, prior to the district court's receipt of the mandate from the Fifth Circuit. Whatever respondents may have done, however, occurred before the Fifth Circuit's mandate had become effective, *Hartford-Empire Co. v. United States*, 324 U.S. 570, 573 (1945); while the district court's injunction was still in effect; and while respondents knew Phototron was seeking a stay of the Fifth Circuit's mandate and prompt review by this Court. If respondents have acted, they have done so at their peril, and in knowing violation of the district court's order. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964). This Court cannot be so easily rushed out of its jurisdiction to review and prevent unlawful mergers.

monopoly in the relevant market. The court of appeals vacated that injunction because it ruled that this Court's decision in *Cargill* required petitioner first to prove that it had already suffered an "antitrust injury."

That decision was wrong. It was wrong in holding that Sections 7 and 16 of the Clayton Act require a plaintiff seeking a preliminary injunction against a proposed merger to demonstrate, first, "a substantial likelihood of having suffered an antitrust injury." App. A, at A-4. It was wrong in holding that it "is not the law" that "facing the specter of a monopoly is enough to create standing in a competitor" to challenge a proposed merger. App. A, at A-7. It was wrong in holding that proof of power to manipulate prices in favor of a merged entity through vertical integration provides no basis for "stopping this merger" by a preliminary injunction. App. A, at A-10. And it was wrong in its interpretation and application of *Cargill*, most especially its holding that *Cargill* has "undermined" the "facially sensible proposition" that "the competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." App. A, at A-7.

But in its impact on future private enforcement of the antitrust laws, in particular Sections 7 and 16 of the Clayton Act, the Fifth Circuit's decision was worse than wrong. It is calamitous to private antitrust enforcement. It threatens to end all private actions under Sections 7 and 16 against anticompetitive mergers in their incipiency, at a time when such mergers are rampant and largely unopposed. Such a result is directly contrary to the purposes of Congress in enacting the antitrust laws, and to the decisions of this Court in interpreting them.

For these reasons, petitioner respectfully asks this Court to grant its petition.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FIFTH CIRCUIT'S MISAPPLICATION OF *CARGILL*

In large part, the Fifth Circuit's decision in this case arose from its interpretation of *Cargill*: "Bound by precedent [*i.e.*, *Cargill*], we follow the Supreme Court's tracks." App. A, at A-5. According to the Fifth Circuit, under *Cargill*, a plaintiff seeking a **preliminary injunction** against a proposed merger cannot prevail unless it has first "demonstrated a substantial likelihood of having suffered an antitrust injury." App. A, at A-4. A plaintiff seeking preliminary injunctive relief cannot prevail merely upon a showing that the proposed merger of its competitors may tend to create a monopoly in the relevant market; such a showing does not establish sufficient "antitrust injury." Thus, in the Fifth Circuit's view, *Cargill* has "undermined" the "facially sensible proposition" that "the competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." App. A, at A-7.

Further, in the Fifth Circuit, "the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law." Instead, to obtain a preliminary injunction, a competitor must plead and prove that some antitrust violation, such as predatory pricing, and some actual antitrust injury have already occurred. If a proposed merger creates merely a threat or probability of monopoly or other predatory conduct, such as price manipulation accomplishable by reason of the merged entity's vertical integration, a competitor lacks standing to obtain a preliminary injunction under Sections 7 and 16. Rather, the competitor's only remedy is to bring a treble-damage action after the threatened violations have in fact eventuated and caused injury. App. A, at A-10.

This is a fundamental misreading of *Cargill*, which petitioner respectfully asks this Court to correct. To petitioner's knowledge, this is the first case since *Cargill* in which a court of appeals, relying on *Cargill*, has reversed a preliminary injunction granted under Sections 7 and 16 of the Clayton Act. Because the court of appeals so fundamentally misapprehended *Cargill*, the court of appeals' decision constitutes a substantial threat to continued private antitrust enforcement.

In *Cargill*, this Court did not announce a new, extremely restrictive standard for antitrust standing to obtain injunctive relief, such as appears in the Fifth Circuit decision. This Court in *Cargill* simply applied the principles of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), to a request for injunctive relief under Section 16: to obtain injunctive relief under Section 16, a plaintiff must show that the proposed merger is likely to cause antitrust injury of "the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489.

In *Cargill*, this Court held that the plaintiff failed to prove such injury, **after a full trial on the merits**, because the plaintiff's allegations and proof had established only that the proposed merger would increase competition, not diminish it. The plaintiff's proof, after a full trial, demonstrated only that the merged entity would have a 20.4 percent share in the relevant market, become the second largest competitor in the market, and engage in fierce price competition with the largest company in the market. In other words, the plaintiff in *Cargill* would be caught in the crossfire of vigorous but lawful competition between the market leader and the merged entity. Whatever injury was threatened to the plaintiff in *Cargill* was the result of increased, not decreased, competition, just as in *Brunswick*, where the plaintiff sought damages to compensate for losses caused by an increase in competition resulting from the continued operations of bowling centers that would otherwise have failed. To read *Cargill* more broadly or differently, as the Fifth Circuit has done, is to misconstrue its meaning.

Obviously, this case presents a situation entirely different from that in *Cargill*, as the district court held in a careful and thorough analysis. App. B, at A-22–26. Here Phototron has shown not that a proposed merger will increase competition, but that it will decrease and eliminate competition by tending to create a monopoly in the relevant market. Respondents here are not combining to enhance their ability to compete with a larger competitor. They are the largest competitors already in the market, by a wide margin. When they combine, they will possess a share of from 66 to 85 percent of the relevant market, dwarfing the nearest competitors and creating the

"only wholesale photofinishing operation operating on a national scale." App. B, at A-17, 26-27.

Mere possession of such a market share is sufficient, in and of itself, to support a finding of monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *see United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945). Combinations producing far lesser domination and concentration in the relevant market have been found by this Court to violate Section 7 of the Clayton Act, particularly where, as here, the industry has displayed a marked history of increasing concentration. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 347 (1962). This Court has further held that such combinations also violate Sections 1 and 2 of the Sherman Act. *United States v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 671-72 (1967), *construing Northern Secur. Co. v. United States*, 193 U.S. 197 (1904); *United States v. Pacific Ry.*, 226 U.S. 61 (1912); *United States v. Redding Co.*, 253 U.S. 26 (1920); and *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922).

In addition, the monopoly resulting from the proposed merger in this case will be able to restrict competition by leveraging Kodak's vertical integration and monopoly in related markets. Kodak has a monopoly over supply in the wholesale photofinishing industry by reason of its 80 percent market share in color print paper and chemicals, the basic materials used by photofinishers to process exposed film. App. B, at A-17. Kodak has a similar monopoly over demand for wholesale photofinishing services by reason of its 80 percent market share of color photographic film, which is delivered by retailers to wholesale photofinishers for processing. App. B, at A-17-18. Through the Colorwatch marketing program already in place, Kodak is able, by massive advertising, to direct demand to wholesale photofinishers using only Kodak paper and chemicals, the prices of which Kodak is able to manipulate in favor of its own and Colorcraft's photofinishing operations, to the detriment and exclusion of competitors, such as Phototron. App. B, at A-18-19, 27.

This is the type of competitive threat entirely absent from the proposed merger in *Cargill*, and exactly the competitive threat this

Court proscribed in *Brown Shoe*. In language directly relevant to the issues in this case, this Court in *Brown Shoe* held that an express purpose of Congress in passing the antitrust laws was to protect smaller horizontal competitors of the merged entity from depredation that might result from use of the merged firm's vertical leverage:

> A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. **But we cannot fail to recognize Congress' desire to promote competition to the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.**

370 U.S. at 344 (emphasis added). Indeed, the degree of vertical foreclosure in *Brown Shoe*, only two to three percent, was substantially less than that involved here. *See* 370 U.S. at 327.

Nor is the language of *Brown Shoe* unique in emphasizing the Congressional purpose of the antitrust laws both to protect small businesses and to encourage private antitrust enforcement. *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 476 (1941):

> For as this Court has said, "trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent

> therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all powerful combination of capital."

(quoting *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)); *United States v. General Motors Corp.*, 384 U.S. 127, 146-147, 148 (1966):

> Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed—as in *Fashion Originators' Guild of America* . . . .
>
> * * *
>
> Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

Thus, this case is entirely unlike *Cargill*, in which, after a full trial, the plaintiff proved only that the proposed merger was likely to increase competition. Here, at the preliminary injunction stage, where relief "is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits," and "[a] party thus is not required to prove his case in full," *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), Phototron established that the proposed combination would tend not to increase competition, but to decrease it, by creating a monopoly in the relevant market. A monopoly, by definition, possesses the power to set prices or exclude competition. *United States v. Grinnell Corp.*, 384 U.S. at 570. Perforce, a competitor facing exclusion from the

incipient monopoly sustains antitrust injury sufficient to obtain relief against that monopoly. To read *Cargill* differently, as the Fifth Circuit has done, wholly misconstrues both that decision and almost a century of Supreme Court precedent.

III. THE FIFTH CIRCUIT'S DECISION MISAPPLIES BOTH SECTIONS 7 AND 16 OF THE CLAYTON ACT

As a prerequisite to obtaining a preliminary injunction against the proposed merger, the Fifth Circuit required Phototron to establish, first, "a substantial likelihood of having suffered an antitrust injury." App. A, at A-4. Neither Section 7 nor Section 16 of the Clayton Act contains such a requirement.

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits any merger the effect which "**may** be substantially to lessen competition, or to **tend** to create a monopoly." (Emphasis added) This Court has expressly noted and remarked on the significance of this language. *Brown Shoe*, 370 U.S. at 323 (footnote omitted):

> Congress used the words "**may** be substantially to lessen competition" (emphasis supplied) to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clearcut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

United States v. Pabst Brewing Co., 384 U.S. at 552; *United States v. Continental Can Co.*, 378 U.S. 441, 458 (1964):

> The issue is whether the merger between Continental and Hazel-Atlas will have probable anticompetitive effect within the relevant line of commerce. Market shares are the primary indicia of market power but a judgment under § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future. Where a merger is of such a size as to be inherently suspect, elaborate proof of

> market structure, market behavior and probable anti-competitive effects may be dispensed with in view of § 7's design to prevent undue concentration. Moreover, the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent.

See also United States v. Von's Grocery Co., 384 U.S. at 280–81 (White, J., concurring).

In the guise of interpreting *Cargill* to require proof of actual foreclosure as an element of "antitrust injury," the Fifth Circuit in this case has read out of existence the prophylactic and prospective elements of a Section 7 violation. In so doing, the court of appeals contravened both Congress and the decisions of this Court. A violation of Section 7 occurs not only when a merger in fact creates a monopoly, but also when it may tend to do so.

Likewise, the Fifth Circuit wholly disregarded Congress and this Court in applying Section 16 of the Clayton Act.

The Fifth Circuit held that Phototron could obtain a preliminary injunction only if it had first "demonstrated a substantial likelihood of **having suffered** an antitrust injury." App. A, at 4 (emphasis added). To the contrary, Section 16 of the Clayton Act, 15 U.S.C. § 26, provides for injunctive relief "against **threatened** loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against **threatened** conduct that **will** cause loss or damage is granted by courts of equity under the rules governing such proceedings." (Emphasis added)

This Court has asseverated both that this language means just what it says, and that it is an integral part of the Congressional plan to encourage private antitrust enforcement. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130–31 (1969):

> . . . § 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. (Footnote omitted) That remedy is characteristically available even though the plaintiff has not yet suffered actual injury

> [citation omitted]; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. [Citations omitted]
>
> Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. [Citation omitted] Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." [Citation omitted] Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect."

Clearly, these admonitions were not followed in this case. Although Phototron convincingly proved that the proposed combination threatened it with harm through price manipulation and other predatory and exclusionary acts, the Fifth Circuit held that Section 16 provided no remedy. Rather, Phototron had to show that such conduct had already occurred and caused injury, or await its occurrence and then seek treble damages for violation of some other provision of the antitrust laws. App. A, at A-10. Phototron asks this Court to grant its petition to correct this extreme misreading of Section 7 and this Court's directive in *Zenith*.

IV. CERTIORARI IS NECESSARY TO PRESERVE AND ENCOURAGE CONTINUED PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS

Over half a century ago, in a landmark case, this Court sustained a judgment against Kodak for engaging in exactly the same conduct shown to exist in this case: monopolizing trade in photographic materials and supplies; purchasing, acquiring control of, and excluding competitors; subjecting dealers to restrictive terms of sale and preventing them from handling competing goods; and manipulating

prices. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368–69 (1927). Moreover, the practices proscribed by this Court in the first *Kodak* case, combinations to eliminate competition, close plants, and discharge employees, have never been approved by this Court, from the earliest days of the antitrust laws. *United States v. American Tobacco Co.*, 221 U.S. 106, 159–60, 163, 166, 174–75 (1911); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 45, 74–75 (1911); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181 (1945).

Now, the court of appeals has not only permitted what this Court found to be unlawful more than 60 years ago, but has fashioned a clearly erroneous decision that threatens to end all private enforcement under Sections 7 and 16 of the Clayton Act. Through a fundamental misreading of *Cargill*, the Fifth Circuit has now established the rule that a competitor may no longer enjoin a proposed merger by showing that the merger may tend to create a monopoly. Rather, the competitor can prove antitrust injury only by showing that monopoly has already occurred and already caused injury to the competitor. The practical effect of this decision will be to deny standing to competitors to challenge any impending merger under Sections 7 and 16, a position this Court expressly rejected in *Cargill*.

So that private antitrust enforcement will not be irrevocably chilled by the decision in this case, Phototron respectfully asks this Court to grant its petition.

CONCLUSION

On the basis of the foregoing arguments and authorities, Phototron respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted this 4th day of April, 1988.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
ALIOTO & ALIOTO
BISHOP, PAYNE, LAMSENS
& BROWN

Counsel for Petitioner

DANIEL R. SHULMAN
JOSEPH M. ALIOTO
RICHARD LEE BROWN

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APPENDIX A

In The United States Court Of Appeals For The Fifth Circuit

No. 88-1128

PHOTOTRON CORPORATION,
Plaintiff-Appellee-Appellant,

VS.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC.,
and COLORCRAFT CORPORATION,
Defendants-Appellants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

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(March 28, 1988)

Before BROWN, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Eastman Kodak Company ("Kodak") appeals the granting of a preliminary injuction against its merger with Colorcraft Corporation, a subsidiary of Fuqua Industries, Inc. After reviewing the record and carefully considering the arguments presented by the parties, we reverse the order of the district court.

Facts

The defendants in this action, Colorcraft and Kodak, have reached an agreement to combine their photofinishing facilities throughout the United States. Colorcraft operates forty-one film processing plants, and Kodak has fifty such labs. The plaintiff in this suit, Phototron, processes film at nine plants in the southern and western United States.

These plants provide processing for amateur's photographic film; Colorcraft, Kodak and Phototron have accounts with large and small retailers who receive film directly from the public. More than ten years ago, the photo processing market offered consumers two choices: either give film to a retailer who would then send the film to a wholesale processor, or use a mail-order service. The recent appearances of photo minilabs and of a trend toward vertical integration by large retailers such as Eckerd Drugs and Wal-Mart have significantly changed market relationships. Although the parties dispute the proper definition of the relevant market for this antitrust action, certainly many consumers — enjoying the wider range of options brought by advancing technology — have altered the manner in which they have their film processed. The more impatient customers, for example, pay extra for the convenience of having their film back in an hour. In 1980, there were few minilabs in operation; today there are over 12,000. As affidavits in the record show, by 1986 minilabs accounted for thirty percent of the entire value and twenty-two percent of the volume of photofinishing services.

Wholesale labs have had to adapt to these changing market circumstances. Colorcraft now processes most of its orders overnight. Some large general retailers have chosen to integrate by installing minilabs on their premises. Many customers are no longer willing to wait a week for their pictures. Against this backdrop, Kodak and Colorcraft have agreed to merge their photofinishing facilities.

Proceedings

Phototron Corporation brought this action seeking, in part, to enjoin the merger of Kodak's and Colorcraft's photofinishing labs.[1] The district court granted a hearing in early February to consider Phototron's application for a preliminary injunction. At the request of the district court, the merger was postponed until February 23, 1988; and on February 22 the district court granted a preliminary injunction.

The record before the district court consisted of affidavits filed by the parties and the oral arguments heard in early February. In his Memorandum Opinion, Judge Mahon found that:

(1) Phototron has standing to challenge the merger;

(2) wholesale photofinishing is the relevant market;

(3) the merger may substantially lessen competition in the relevant market;

(4) the grant of preliminary injunction is appropriate given the threat of loss and damages Phototron may suffer.

Issues

Kodak challenges the district court's rulings on standing and the relevant market. Our decision on the standing issue, however, forecloses the need to take up the more difficult relevant market issue.

Before setting forth the strict standing requirements, we remind ourselves of a well established principle: a preliminary injunction can be granted only when the district court has found "a substantial likelihood that plaintiff will prevail on the merits." *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). One of the merits

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[1] Kodak and Fuqua filed pre-merger notification materials on December 7, 1987 with the FTC and the Antitrust Division of the Justice Department pursuant to the Hart-Scott-Rodino Act. Phototron filed this action on December 21, 1987, three days before the FTC cleared the merger. In its complaint, Phototron alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Section 7 of the Clayton Act. 15 U.S.C. § 18, and state law. For relief, Phototron seeks $100 million in actual damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, and an injunction under Section 16 of the Clayton Act.

issues that must be decided at trial is whether Phototron has suffered an antitrust injury, for without such an injury, Phototron lacks standing to sue. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S.Ct. 484, 491, 93 L.Ed.2d 427, 438 (1986). The district court therefore erred in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likelihood of having suffered an antitrust injury. The district court correctly noted that no rigorous proof of antitrust injury was necessary at this early stage of consideration.[2] Given the onerous effects of granting a preliminary injunction, however, more than mere pleading is necessary to establish standing even at this stage. Because the district court determined that the pleadings sufficed standing alone,[3] we must, at the least, remand the case for a determination whether there is a substantial likelihood that Phototron will be able to prove antitrust injury at trial. Given the need for us to render a final decision on this issue, we look beyond a remand and review the record to determine whether we can make the "substantial likelihood" determination ourselves.

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[2]The district court stated:

> Only the issue of **preliminary** injunctive relief is before the Court . . . . Phototron must allege an antitrust injury which flows from the proposed Kodak-Colorcraft combination and sustain only that burden of proof which would entitle it to **preliminary,** not permanent injunctive relief.

Mem. Op. at 15.

[3]The district court initially indicated that it would decide whether Phototron was likely to succeed on the standing issue.

> Phototron has made the requisite allegations in its Complaint and, as will be seen in Part II(b) of this Opinion, made the applicable showing required for equitable injunctive relief.

Mem. Op. at 15-16. Part II(B), however, never addresses the standing issue, but rather focuses only on the likelihood of success on the statutory claims. The merits of any case embody several elements that the plaintiff must prove to prevail at trial. In this case, those elements are: 1) standing, 2) establishing the relevant market, and 3) one or more of the substantive claims (e.g. Clayton Act § 7, Sherman Act §§ 1 and 2).

In *Cargill*, the Supreme Court decided that a competitor could obtain a permanent injunction against a merger by meeting the same standing requirement that the Court articulated earlier in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). *Brunswick* allows treble damage recovery under Section 7 of the Clayton Act only when plaintiffs have shown antitrust injury:

> Plaintiffs must prove **antitrust** injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

429 U.S. at 489, 97 S.Ct. at 697.

This burden on the private plaintiff is a significant one, and the Supreme Court's decision to make it such was aptly noted in Justice Stevens' dissent in *Cargill:*

> This case presents the question of whether the antitrust laws provide a remedy for a private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the post merger conduct of the merging firms and deny relief unless the plaintiff can prove a violation of the Sherman Act. Second, the Court might concentrate on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path.

107 S.Ct. at 496, 93 L.Ed. at 443–44. Bound by precedent, we follow the Supreme Court's tracks.

Under *Cargill*, a competitor of two merging entities has standing to challenge the merger if an allegation and proof of predatory pricing is made. In its complaint, Phototron alleges that Kokak and Colorcraft have provided photofinishing services at below cost; specifically, the complaint asserts that the companies have been operating their wholesale labs "unprofitably or at substantially reduced

profit margins for at least the short term, until plaintiff is forced to go out of business or sell to defendants or their surrogates." "Operating . . . at substantially reduced profit margins," however, is not equivalent to pricing in a predatory manner; it is simply pricing in a competitive manner. An allegation that one is operating "unprofitably" comes close to alleging predatory pricing.[4] We withhold a determination of how precisely predatory pricing must be alleged in order to assert an antitrust injury, turning instead to the easier conclusion that Phototron has not demonstrated a substantial likelihood of prevailing on its allegation at trial.

Phototron alleges carefully that Kodak and Colorcraft were operating unprofitably because they "have charged prices for photofinishing services to actual and potential retail customers of plaintiff that are substantially below the prices **plaintiff** can charge and still operate profitably" (emphasis added). The sentence's conclusion does not, of course, necessarily follow from its stated premises. To satisfy the "substantial likelihood" requirement for preliminary injunctive relief, Phototron must present some evidence that Kodak or Colorcraft has sold photofinishing services below **its** cost. In his affidavit, the president of Phototron asserts that Kodak and Colorcraft have been able to undercut the price Phototron offers retailers by "operating at a loss, or [ ] receiving discounts from Kodak on color print paper or chemicals." This "evidence" — sufficient in form for this matter in limine — merely restates the allegation. It affords no showing that Kodak or Colorcraft are actually doing that which Phototron suspects they are doing. To the contrary, Phototron offered evidence of Colorcraft's profitability in 1986, and the price of developing through

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[4] Kodak urges us to find that "operating unprofitably" is not sufficient for asserting predatory pricing. Our Circuit defines predatory pricing as pricing below marginal or average variable cost. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984). The Supreme Court has not given a pinpoint definition of predatory pricing; it has thus far settled for the vague term "pricing below cost."

Kodak labs is among the highest in the industry.[5] We see no likelihood that Phototron would prevail on the merits of its predatory pricing allegation; much evidence, however, suggests that it would not. Accordingly, Phototron has failed to establish standing under a predatory pricing theory.

Phototron argues that other evidence of predatory behavior by Kodak and Colorcraft constitutes antitrust injury. Although the district court made no such findings, we shall address Phototron's concerns individually.

1. Threat of Monopolistic Behavior

Phototron boldly asserts that "[t]he competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." This facially sensible proposition has been undermined by *Cargill.* In *Cargill,* the Court required that the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury. Phototron suggests that the merits of the Kodak-Colorcraft merger are an important consideration in determining standing. As its brief forcefully states: "The monopoly created by the combination of the two largest current competitors clearly threatens to destroy any remaining competitors, including Phototron. Certainly the antitrust laws, which prohibit monopolies, allow a competitor that will be destroyed by a monopolist to use those laws for protection." As Justice Stevens noted in his dissent in *Cargill,* however, the Supreme Court will not grant relief if there is simply "a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." 107 S.Ct. at 496, 93 L.Ed. at 444. Therefore, the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.

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[5] Fuqua's 1986 Annual Report — which was submitted in evidence by Phototron — states that "Colorcraft's earnings increased for the fifth consecutive year, up 33% in 1986 and 12% in 1985 . . . . Profit margins as a percentage of sales declined in 1985 because of the acquisition of Berkey operations but improved in 1986 primarily from economies gained by eliminating duplicate expenses of Colorcraft and Berkey."

2. Massive Use of Advertising

Phototron urges us to find that massive use of advertising and promotion by the merging companies will exclude competition. Advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent. "A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2nd Cir. 1979).

Phototron supports its advertising injury assertion by pointing to the "advertising-driven Colorwatch program." Despite its complaints regarding the Colorwatch system,[6] Phototron has failed to provide any evidence showing that it has a substantial likelihood of proving this injury at trial. Colorwatch is **not** advertising by the wholesale photofinishers; it is a marketing program aimed at the public through retailers but undertaken by a supplier of materials to wholesale photofinishers. In this instance, the supplier happens to be Kodak. Phototron certainly would not attempt to stop this merger if Colorwatch were instead a marketing system developed by another supplier of paper and chemicals to wholesale photofinishers. Even more revealing, the success of wholesale photofinishing is not tied to being a participant in Colorwatch: Colorcraft has been enormously profitable in the past few years when it has **not** been a member of the Colorwatch program. Phototron may have a monopoly or price discrimination action against Kodak as a manufacturer of chemicals and paper, but it cannot use the perceived anticompetitive effects of Colorwatch to challenge this merger. Without evidence of how advertising in the wholesale photofinishing industry can act as a barrier to Phototron's participation in the industry, we cannot conclude that Phototron is likely to succeed on this theory of predation.

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[6] "Colorwatch" is a service mark that retailers display indicating that customers may have their film sent to participating Colorwatch processors where film is developed under quality standards on Kodak-brand paper. A Colorwatch wholesale processor must abide by the quality standards set by Kodak and only use Kodak paper and chemicals in its plant. Of course other plants operated by the wholesaler may use any paper and chemicals it chooses, even Kodak supplies. No special discount is given by Kodak on paper and chemicals to Colorwatch participants.

3. Limit Pricing

Setting one's price at a level just below that which a prospective entrant to the market would need to charge in order to sustain a successful entry is often referred to as "limit pricing." As noted in *Dimmitt Agri Industries, Inc. v. CPC Intern. Inc.*, 670 F.2d 516 (5th Cir. 1982), this practice clearly evinces monopolistic intent. In *Dimmitt*, the plaintiffs introduced clear evidence that "the company was out to exclude other competitors from the market." 679 F.2d at 524. Kodak contends that, as a matter of law, a company already competing in an industry can never allege limit pricing in order to establish antitrust injury because "a limit price, like a monopoly price, is still set at a supra competitive level[;] it can never hurt a competitor that is already in the market." We defer judgment on this contention to a later time. Nonetheless, no evidence in the record supports the allegation of limit pricing, and, as we have said above, without more than a mere allegation, Phototron cannot have standing.[7]

4. Independent Carriers

Phototron contends that the merger will deny competitors access to the market by foreclosing access to independent couriers. This argument clearly lacks merit. Although Kodak will be able to suspend its use of much courier service when it combines its operations with Colorcraft, Phototron will suffer no injury. The courier industry requires neither a large capital investment nor a large consumer base. Newspaper delivery boys are as available in Bugtussle, Texas, as they are in Los Angeles, California. Phototron has presented no evidence to the contrary.

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[7] Phototron's president claims that Kodak has stated to some of Phototron's major retail accounts that "Phototron will be sold or will go out of business." This speculation by Kodak is not proof of limit pricing; it may simply be a recognition that Phototron is no longer a viable competitor. Antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

5. Vertical Integration

Kodak's domination of the color film and color print paper and chemicals markets is the final source of injury that Phototron asserts. Phototron argues that Kodak's dominant position in the supply markets will allow it to "manipulate prices and other terms of sale of these products so that independent wholesale photofinishers are at a distinct disadvantage in competing with wholesale photofinishers owned or controlled by Kodak." Phototron's fear of price discrimination is understandable; its attempt to address this fear by stopping this merger is, however, misdirected. If Kodak is manipulating prices on the sale of its paper and chemicals to customers, then a price discrimination suit should be brought against Kodak, not against this merging entity.

Conclusion

Cargill has imposed significant barriers to competitor attempts to enjoin merger transactions. To obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured. Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

Preliminary injunctions are extraordinary remedies. The Supreme Court has recognized the danger of granting injunctive relief to parties who are not injured by a merger. That concern, expressed in *Cargill,* must inform our decision today. The order of the district court is ***REVERSED.***

APPENDIX B

In The United States District Court For The Northern District of Texas Fort Worth Division

Civil Action No. CA4-87-910-E

PHOTOTRON CORPORATION,

vs.

EASTMAN KODAK COMPANY, et al.

MEMORANDUM OPINION AND ORDER

Phototron seeks a preliminary injunction to enjoin Kodak and Colorcraft from combining their United States photo finishing operations. The requirement that the judiciary be candid is perhaps absolute:[1] the Court admits that the question presented here is close.

[1] Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 750 (1987).

> With characteristic honesty and eloquence, Learned Hand recognized this fundamental tension, perhaps paradox, reposed in the antitrust laws. Having concluded that Congress "did not condone good trusts and condemn bad ones; it forbad all," he announced with equal fervor, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945).

But for the reasons stated below, the Court finds that the proposed combination must be preliminarily enjoined[2] until the merits of this action can be reached, as the Defendants' consolidated operations may tend to harm competition in violation of Section 7 of the Clayton Act.[3]

In sum, the Court concludes the following **solely** for the purpose of determining whether a preliminary injunction should issue:

1. Phototron has standing to challenge the proposed combination;

2. For the purposes of analyzing the proposed combination under Section 7 of the Clayton Act, wholesale photo finishing is the relevant product market;

3. In light of alleged predatory pricing activities and preferential pricing practices, the proposed combination may substantially lessen competition in the national market for the procurement of wholesale photo finishing services in violation Section 7 of the Clayton Act; and,

4. Phototron is threatened with significant loss or damage within the meaning of Section 16 of the Clayton Act as a result of the proposed combination, and preliminary injunctive relief should enter to prevent threatened violations of the Act.

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[2]Section 16 of the Clayton Act provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . , when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts or equity . . . . , a preliminary injunction may issue.

15 U.S.C.A. § 26 (West Supp. 1987).

[3]Section 7 of the Clayton Act prohibits mergers when the "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . . ." 15 U.S.C.A. § 18 (West Supp. 1987).

I. FACTS AND PROCEEDINGS

The parties mutually agreed that Phototron's Application for Preliminary Injunction would be decided upon affidavits and memoranda of law without an evidentiary hearing. On February 5, 1988, oral argument was heard; counsel for both sides presented fine and thoroughly-prepared arguments. The Court emphasizes that this issue is being decided based upon **limited** documentary evidence; this limitation results solely from the parties' agreement. There has been no discovery. While the evidence submitted in support of and in opposition to the preliminary injunction "need not be repeated" at trial,[4] it should be understood that any fact finding made here is not irrevocably set in stone. Since the scope and weight of the evidence may change as the action proceeds, so may these fact findings. With that admonition in mind, the Court submits the following.[5] These findings of fact and conclusions of law are based solely upon the affidavits, exhibits, briefs, arguments, and file developed thus far in this case.

The Plaintiff Phototron Corporation ("Phototron") has brought an action against Defendants Eastman Kodak Company ("Kodak"), Fuqua Industries, Inc. ("Fuqua"), and Colorcraft Corporation ("Colorcraft"). In addition to its causes of action under Texas common law, Phototron has asserted that the Defendants have violated Sections 1 and 2 of the Sherman Act, and Section 7 of the Clayton Act.

The Defendants Kodak, Fuqua, and Colorcraft have entered into an agreement to combine the photo finishing operations of Kodak and Colorcraft. Kodak and Colorcraft have agreed to postpone the

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[4] Fed. R. Civ. P. 65(a).

[5] Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part: "[I]n granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review."

Rule 65(a) recognizes this fact-finding requirement. It states that even when the hearing on the application for a preliminary injunction is not consolidated with a trial on the merits, "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial."

consummation of this transaction until February 22, 1988. The Court agreed to issue a ruling on Phototron's Motion for Preliminary Injunction at that time.

Colorcraft is a wholly-owned subsidiary of Fuqua Industries. Fuqua conducts its photo finishing operations through Colorcraft. Phototron, Kodak, and Colorcraft all provide wholesale photo finishing services. The photo finishing industry is composed of amateur and professional laboratories. There is no dispute that, for purposes of market determination, professional and amateur labs are essentially non-competing and that only the labs developing the photographs of amateurs must be considered here.

Nor is there any serious dispute between the parties that the amateur photo finishing industry is divided, basically, into four segments or "product markets":[6] (1) "instant" photo finishing services where photo finishing is accomplished on-site at "minilabs"; (2) large integrated processing labs ("captive photofinishing labs") tied to major retail establishments, who process photographs in their own facilities;[7] (3) retail "mail-order" operations where photographs are sent to large-scale photo finishing laboratories for processing; and, (4) wholesale processing labs that market photo finishing to retailers on a competitive basis.

The parties also agree, or at least for the purposes of argument assume, that the relevant geographic market is the national market. Based upon the record, the Court also agrees that the national

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[6] The "relevant market" concept entails two separate considerations: (1) the product market or "line of commerce"; and (2) the geographic market or "section of the country." *See, e.g., Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268, 279 (1934).

> The outer boundaries of a product market are determined by reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Brown Shoe Company v. United States, 294 U.S. 294, 325 (1962).

[7] Wal-Mart and Eckerd Drugs would be stores with their own "minilab" for film processing.

market is the applicable one. It is at this point—the point of determining the relevant product market—that the parties and the experts part company.

The Plaintiff's expert contends that **wholesale** photo finishing is the relevant economic market for antitrust analysis. Kodak and Colorcraft each have engaged an expert. Their experts contend that **all sources** of photo finishing services that are available to amateurs —in addition to the wholesale photo finishing market—should be included in the relevant market. All three experts are knowledgeable, well-qualified, and respected economists.

For the limited purpose of determining whether a preliminary injunction should issue, the Court finds that Phototron's expert is the most persuasive since he emphasizes the actual conditions in the photo finishing marketplace[8] and the theoretical implications of the proposed combination.[9] Hence, for the consideration of the issue at hand, the relevant product market will be that segment of the ama-

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[8] In his Affidavit Professor Saving writes:

> The "quick" finishing market is separate and distinct from the wholesale photofinishing market in that it represents those consumers who place a high value on time. The *Photofinishing Industry Report* indicates that in 1986 minilab processing had an average cost of $8.23. Film processed in large labs ranged in cost from $5.36 retailed at Department Stores, $5.34 retailed at Drug Stores, $4.71 retailed at Discount Stores, $4.23 retailed at Supermarkets, and $3.85 retailed through mail order. The weighted average retail cost of photofinishing in large labs was $4.57. Thus, minilab film processing was 80 percent more costly than large lab processing. This large price differential is suggestive of significant market segmentation.
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> . . . .
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> Important for the issue at hand is the fact the "captive" labs do not represent a source of processing for retail outlets that are not part of the integrated system. Thus, even though the "captive" photofinishing labs are part of the overall supply of photofinishing services, they may not exert significant competitive pressure on the price and terms upon which the independent wholesale photofinishing lab services are available.

Affidavit of Thomas R. Saving at pp. 5-6.

[9] *See infra* pp. 8-10.

teur photo finishing market defined above as "wholesale photofinishing labs that market photofinishing to retailers on a competitive basis."

In 1954, Kodak had a near absolute monopoly in the color photo finishing market.[10] During that same year, Kodak entered into a consent decree with the Justice Department which dramatically changed the structure of this market. "Kodak was forbidden to link photofinishing to film sales, and it agreed to make its processing technology, chemicals and paper available to rivals at reasonable rates."[11] As a result of the consent decree, Kodak reduced its overall market share in photo finishing from 96% in 1954 to 10% in 1976. However, since 1976, Kodak appears to have embarked upon a series of acquisitions to increase its share of the wholesale photo finishing market.

In 1985, Kodak owned 10 photo finishing laboratories. In December of 1986, Kodak purchased Fox Photo ("Fox") which itself had previously acquired a number of photo finishing plants. At the time of its acquisition, Fox owned 20 such laboratories. In October of 1987, Kodak acquired American Photo Group Corporation, gaining 20 more wholesale photo finishing plants with this acquisition, Qualis Photofinishing Company, and CX Corporation.

Fuqua has also demonstrated a proclivity for acquiring its competitors. In 1985, Fuqua purchased Berkey Photo, Inc. In 1987, Colorcraft, a wholly-owned subsidiary of Fuqua, bought Magnicolor Photo Labs, which had six wholesale photo finishing plants. If the Kodak-Colorcraft combination takes place, there will be a dramatic concentration of the wholesale photo finishing industry compared to the industry that existed just three years ago.[12]

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[10] *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 270 (2d Cir. 1979).

[11] *Berkey*, 603 F.2d at 271.

[12] After the proposed combination, there will be only four or five separate entities with more than local scope in the wholesale photofinishing market. They are: the Plaintiff Phototron, Fotomat, and Guardian Photo (a member of the Kodak "Colorwatch" program). None of the remaining competitors operating on a national scale will have one-fifth of the combined size of the defendants.

In 1986, the amateur photo finishing market had a 4.169 billion-dollar value. Wholesale photo finishers account for approximately 17 to 22 percent of the amateur photo finishing market by value. According to Phototron's expert, this 17 to 22 percent market share translates into a dollar volume for wholesale finishers of between $704 and $911 million. Kodak is estimated by industry sources to have sales of wholesale photo finishing of $300 million. Using the conservative figure of $911 million, Kodak now has approximately a 33 percent share of the wholesale photo finishing market.

The proposed merger with Colorcraft would increase this market share. Colorcraft owns 41 photo finishing labs. It had wholesale photo finishing sales of almost $300 million in 1986.[13] The Kodak-Colorcraft transaction would result in a firm with 94 large wholesale photo finishing laboratories and projected sales of $600 million in sales. Since the entire wholesale photo finishing market is $911 million, the combination of Kodak and Colorcraft will have a market share of 66 percent. The market share of the proposed Kodak-Colorcraft firm measured in terms of sheer numbers of large photo finishing labs is also in line with the dollar-value percentage.[14] The Kodak-Colorcraft combination will produce a combined market share between these two entities of somewhere between 66 to 85 percent in wholesale photo finishing.

This increased market share is particularly relevant since Kodak maintains a dominant position in both producing and supplying raw materials that are used in photo finishing. The materials market consists of photochemicals and paper. Of the firms that supply these materials, Kodak possesses almost 80 percent of the materials market. Kodak occupies a similar position in regard to color and black and white film used by amateur photographers. Phototron's expert states that the "amateur photographer, the largest customer of photographic products and services, purchases more than 80 per-

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[13]Colorcraft had $265 million and Magnicolor, a newly acquired subsidiary, had $35 million.

[14]The Kodak-Colorcraft combination would represent more than 55 percent of all wholesale photofinishing labs, or 94 out of 170 large non-captive wholesale photofinishing labs in the United States. Affidavit of Thomas R. Saving at p. 8.

cent of his film from Kodak."[15] Based upon the record as presented, Kodak will have achieved, after the proposed combination, extensive vertical integration in all three related markets: (1) wholesale photo finishing, (2) photo finishing materials, and (3) color film.

This vertical integration is particularly enhanced by Kodak's "Colorwatch" program. "Colorwatch" is an advertising program which requires retail outlets to limit their selection of wholesale photo finishing firms to those who exclusively utilize Kodak photo finishing materials. Phototron's expert describes the program as follows:

> Kodak requires that wholesale processing labs that process film for Colorwatch customers use only Kodak chemicals and paper for all their photofinishing independent of whether or not that photofinishing is for a Colorwatch customer. Kodak's unique advantage over its competitors stem from the fact that Kodak can advertise its name, thereby enhancing sales of both film, photofinishing materials, and photofinishing services. Because Kodak, owns only a small market share of retail outlets, it cannot directly control the retailers' selection of a wholesale photofinishing firm. However, if through advertising of the Colorwatch seal, Kodak can gain customer preference for retail outlets displaying the colorwatch seal, then Kodak can expand its sales of photofinishing materials.[16]

The Kodak's expansion into the wholesale photo finishing labs through the proposed combination gives Kodak the ability to limit entry into the wholesale photo finishing market. This is especially onerous where Phototron and its Affiant, Joseph T. Borkowski, have alleged predatory pricing activities on the part of the Defendants. It is alleged, both in Phototron's verified Complaint and in President's Affidavit, that Kodak and Colorcraft have quoted prices to retailers which demonstrate their subsidiary wholesale photo finishers are

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[15] Affidavit of Thomas R. Saving at p. 9; Affidavit of Joseph T. Borkowski at p. 4.

[16] Affidavit of Thomas R. Saving at p. 10. The Colorwatch program is also fully explained in paragraph 15 of the Plaintiff's Complaint.

either "operating at a loss, or are receiving discounts from Kodak on color print paper and chemicals."[17] Although the record before the Court is limited, it will support a finding that the proposed Kodak-Colorcraft combination will enable the combined entity to effectuate the below-cost pricing activity Phototron alleges it has already engaged in.

In light of the alleged predatory pricing activities, the dominant position that the proposed Kodak-Colorcraft entity would occupy in the wholesale photo finishing market—considered jointly with the leverage Kodak maintains through its vertical integration in related markets of photo finishing materials and color film—severely threatens Phototron's ability to compete for business from retail outlets. After the proposed combination, Kodak and Colorcraft will have significantly increased power to purchase paper and chemicals at reduced prices, while forcing Phototron to purchase the same items at a higher price.

Thus, considered as a whole, the limited record before the Court supports two findings of the utmost importance: (1) that the alleged below-cost pricing activities and preferential pricing practices of Kodak and Colorcraft will "lessen competition" and "tend to create a monopoly;"[18] and, (2) that these predatory practices will create a substantial likelihood of significantly impairing, perhaps even destroying, Phototron's business. The loss of Phototron as an independent competitor in the wholesale photo finishing marketplace would further reduce competition and increase the combined entity's alleged monopoly power.

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[17] Affidavit of Joseph T. Borkowski at p. 5.

[18] 15 U.S.C.A. § 18 (West Supp. 1987).

II. LEGAL DISCUSSION AND CONCLUSIONS OF LAW

A. Standing to Enjoin

Phototron's standing to enjoin the proposed Kodak-Colorcraft combination is heavily disputed. In this regard, the applicability of only one case is in issue: *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S. Ct. 484 (1986). The Defendants insist that this recent Supreme Court case prevents the Court from reaching the substance of Phototron's antitrust claims. When viewed in the aftermath of *Cargill*, the Defendants argue, the Plaintiff lacks standing to challenge this joint venture. The Court disagrees. Phototron has standing to enjoin the proposed combination.

In *Cargill*, the Excel Corporation,[19] the second-largest entity in both the cattle slaughtering and boxed beef production markets, sought to merge with the third largest competitor in those markets, Spencer Foods.[20] IBP, Inc., not a party to the *Cargill* action, was the largest beef packer in the United States. After the proposed combination, the relative market shares in the beef industry would have appeared as follows:

Cattle Slaughtering Market		**Box Beef Production Market**	
IBP, Inc.	24.4%	IBP, Inc.	27.3%
Defendants	20.4%	Defendants	20.4%
Plaintiff	5.5%	Plaintiff	5.7%

It is important to note that even after the Excel-Spencer merger, their combined market share would still not have exceeded that of the largest market participant, IBP. The Plaintiff, Monfort, the nation's fifth largest beef packer, brought an action under section 16 of the Clayton Act seeking to enjoin the prospective merger.[21]

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[19] Excel was a wholly-owned subsidiary of Cargill.

[20] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484, 487 (1986).

[21] *Cargill*, 107 S. Ct. at 487–88.

The parties in *Cargill* agreed to consolidate, under Rule 65(a), the motion for preliminary injunction with a full trial on the merits. Plaintiff Monfort never alleged or proved a scheme of predatory pricing on the part of the Defendants. The District Court in its Memorandum Opinion twice made note of this omission.[22] Yet, the District Court found "that the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly . . . ."[23] The District Court, pursuant to section 16 of the Clayton Act, permanently enjoined the merger. The Tenth Circuit Court of Appeals affirmed the District Court's ruling but was reversed on appeal to the Supreme Court.

The Supreme Court defined predatory pricing as "pricing **below** an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."[24] The Court found that Monfort's allegations and proof did not support a finding of this essential form of antitrust injury. The Supreme Court found that Monfort's injury resulted only from increased competition, not anticompetitive tactics on the part of the Defendants. Since price competition was not a predatory activity and no allegation had been made that Excel would act with predatory intent after the merger, the Court concluded that "Monfort neither raised

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[22] *Cargill*, 107 S. Ct. at 494.

[23] *Monfort of Colorado, Inc. v. Cargill*, 591 F. Supp. 693, 710 (D. Colorado 1983).

[24] *Cargill*, 107 S. Ct. at 493. The caselaw of the Fifth Circuit is in accord with the requirement that pricing to be predatory must be "below cost." In *Adjusters Replace-A-Car v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 890–91 (5th Cir. 1984), the Court wrote:

> In sum, although we follow with interest the continuing debate over theories of predation, the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless the defendant has set his price below his average variable cost.

The Court pointed out in a footnote that "[w]hen a legitimate dispute arises as to the characterization of certain costs [fixed or variable], the question is one of fact to be resolved by the jury." *Adjusters*, 735 F.2d at 891.

nor proved any claim of predatory pricing before the District Court."[25] The linchpin of the *Cargill* decision is the requirement that a plaintiff seeking to **permanently** enjoin an allegedly unlawful business combination must allege and prove an actionable antitrust injury which results from the proscribed combination.[26]

In this cause, the Defendants' insistence that Phototron lacks standing to attack the Kodak-Colorcraft joint venture stems from their overly broad interpretation of *Cargill.* The case at hand is distinguishable on three grounds.

First, in *Cargill,* the Supreme Court reached its conclusion after there had been a complete trial on the merits. Hence, the requirement that a plaintiff seeking relief under section 16 of Clayton Act plead and **prove** a related antitrust injury. The parties in *Cargill* agreed to a consolidated trial on both the preliminary injunction and the merits of the case. Here, the parties reached no similar agreement. Only the issue of **preliminary** injunctive relief is before the Court. Thus the holding of *Cargill* applies to this case in a more limited sense. Phototron must allege an antitrust injury which flows from the proposed Kodak-Colorcraft combination and sustain only that burden of proof which would entitle it to **preliminary,** not permanent, injunctive relief.

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[25] *Cargill,* 107 S. Ct. at 494.

[26] *Cargill,* 107 S. Ct. at 491 (citing *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977). The Court wrote: "We conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Id.*

Second, unlike the plaintiff in *Cargill*, Phototron has made the requisite allegations in its Complaint and, as will be seen in Part II(B) of this Opinion, made the applicable showing required for equitable injunctive relief.[27]

In paragraph 15(i) of its verified Complaint, Phototron alleges a predatory pricing scheme:

> [W]holesale photo finishing plants owned by defendant Kodak, defendant Colorcraft, and Guardian have charged prices for photo finishing services to actual and potential retail customers of plaintiff that are substantially below the prices plaintiff can charge and still operate profitably, and that reflect that defendant Kodak's wholly owned plants and plants owned by defendant Colorcraft, Guardian, and others are either paying substantially lower prices for Kodak photographic paper and chemicals than is plaintiff, receiving concession, inducements, and other considerations that are equivalent to lower prices for Kodak photographic paper and chemicals, **or operating unprofitably** or at substantially reduced profit margins for at least the short term, until plaintiff is forced to go out of business or sell to defendants or their surrogates.

Below-cost pricing is further alleged in the Affidavit of Joseph T. Borkowski, President of Phototron:

> Wholesale photo finishers controlled by Kodak and Colorcraft have approached major retail accounts of Phototron with photo finishing prices competitive with or

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[27] The movant bears the burden of proving the four elements necessary for the issuance of a preliminary injunction:

> (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not issued; (3) that threatened injury to the movant outweighs any damage the injunction might cause to the opponent; and (4) that the injunction will not disserve the public interest.

Gearhart Industries, Inc. v. Smith International, Inc., 741 F.2d 707, 710 (5th Cir. 1984).

> below the photo finishing prices offered to these same customers by Phototron. The prices quoted by wholesale photo finishers controlled by Kodak and Colorcraft demonstrate either that **such wholesale photo finishers are operating at a loss**, or are receiving discounts from Kodak on color print paper and chemicals . . . .[28]

Thus, Phototron has adequately alleged "threatened loss or damage of the type the antitrust laws were designed to prevent . . . ."[29]

Third, the antitrust injury Phototron claims it has or will suffer is sufficiently related to the Defendants' proposed, and allegedly unlawful, combination.[30] This related antitrust injury is markedly different than the injury the plaintiff in *Cargill* alleged—an injury which resulted only from increased competition. Two striking differences between the case at hand and *Cargill* bear this out.

The first critical distinction arises in terms of market share. Even after the proposed merger in *Cargill*, the defendants would have had only 20.4% of the relevant market. The *Cargill* defendants would have occupied only a second-place position of dominance in the relevant market in vigorous competition with the dominant firm, IBP. But this is not the case before the Court. Here, the Defendants are the two largest competitors in the wholesale photo finishing market. They will double this market share through the proposed combination. This dominant market share is particularly important in light of Kodak's strong position in two related markets. Kodak is

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[28] Affidavit of Joseph T. Borkowski at pp. 4–5. *See also* Plaintiff's Supplemental Memorandum of Law at p. 4 ("Kodak and Colorcraft photo finishers have been quoting prices to Phototron customers at levels that are either **below cost** or that reflect paper and chemicals pricing substantially below list.") (emphasis added).

[29] *Cargill*, 107 S. Ct. at 491.

[30] "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

the dominant supplier to the photo finishing industry. It is also the dominant manufacturer of conventional color photographic film.[31] Kodak's dominance in these related markets leads the Court to the second distinguishing factor concerning relevant and related markets which arises in this case but was not present in *Cargill*.

Cleverly, the Defendants argue that Phototron's injury does result from the proposed Kodak-Colorcraft transaction. "Rather, the allegation complains of actions allegedly taken by Kodak in the implementation of the Colorwatch program."[32] This argument is not without merit. But based upon the record as presented and considered as a whole, the Court finds that the Colorwatch program is sufficiently related to the Kodak-Colorcraft transaction so that it could reasonably be said that the proposed combination will further expand and aggravate the antitrust injury which flows from the Defendant's alleged predatory pricing activity. The further facilitation of these alleged activities would constitute "threatened loss or damage by a violation of the antitrust laws" to Phototron's business.[33]

A review of the limited record before the Court uncovered no convincing evidence which would militate against such a finding. Rather, Kodak's dominance in related markets supports it. The *Cargill* case is particularly dissimilar in this regard. There, the pro-

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[31] The record before the Court supports this finding. Mr. Borkowski states in his Affidavit:

> Kodak both sells the film that customers return to retailers for processing by wholesalers, and supplies the materials, i.e., color print paper and chemicals, that wholesale photo finishers primarily use to develop the film delivered to them by retail customers. In both markets, Kodak possesses a dominant share, at least 80%.

[32] Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at p. 8.

[33] 15 U.S.C.A. § 26.

posed combinaton created no threat of dominance in either the relevant or related markets.[34]

For the reasons stated above, Phototron has standing to challenge the proposed combination.

B. Standards Governing the Issuance of an Injunction

When seeking injunctive relief, the moving party bears the burden of persuasion on each of the following elements: (1) substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to it outweighs the threatened harm the injunction may do to the defendant, and (4) that the granting the preliminary injunction will not disserve the public interest.[35] When the wholesale photo finishing is considered the relevant product market, Phototron has met its burden of persuasion on each of these elements.

1. Substantial Likelihood of Success on the Merits

Section 7 of the Clayton Act prohibits acquisitions or combinations the effect of which is substantially to lessen competition, or to tend to create a monopoly.[36] Based upon the limited record before the Court and its preliminary finding that wholesale photo finishing is the relevant product market, the combination in issue here is the type precluded by section 7.

The Kodak-Colorcraft combination will possess between 66 and 85 percent of the wholesale photo finishing market. Because of pre-

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[34] *Cargill*, 107 S. Ct. at 487. *See also* Plaintiff's Supplemental Memorandum of Law at p. 8 ("this case presents vertical aspects that render the injury to Phototron much different from that threatened in *Cargill* . . . .").

[35] *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); *Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707, 710 (5th Cir. 1984).

[36] 15 U.S.C.A. § 18 (West Supp. 1987).

vious acquisitions,[37] the wholesale photo finishing market has diminished in size to only two major national entities (the Defendants). If this combination is not enjoined, at least until the structure of the wholesale photo finishing market can be thoroughly examined, a strong case can be made that there will be only one wholesale photo finishing entity operating on a national scale. The concentration threatened here is even more severe than that condemned in other Supreme Court cases.[38]

This proposed combination also has another menacing aspect: vertical integration. Kodak is not only a horizontal competitor of Colorcraft, but also a substantial, arguably predominant, supplier of raw materials to the wholesale photo finishing industry. This position of dominance and control, considered in conjunction with Kodak's influence over Colorcraft through the "Colorwatch" program, seriously threatens competition not only in the wholesale photo finishing services market but also in the color print paper and chemicals market. This form of vertical integration when analyzed in conjunction with the horizontal aspects of the proposed combination leads the Court to the conclusion that if combination is not enjoined, at least preliminarily, its effect will be to substantially less competition and tend to create a monopoly.[39] The need for immediate temporary relief is further support by Phototron's prima facie showing of predation at the photo finishing level.[40]

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[37] *See supra* note 12 and accompanying text.

[38] *See, e.g., United States v. Pabst Brewing Co.*, 384 U.S. 546, 551 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 300 (1962).

[39] 15 U.S.C.A. § 18 (1982).

[40] *See supra* pp. 15-16.

Moreover, the Court cannot ignore Kodak's long history of anti-competitive behavior.[41] In *United States v. Paramount Pictures, Inc.*, the Supreme Court stated that "the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the prerequisite purpose or intent attends the presence of monopoly power."[42] The limited record currently developed in this cause—a record replete with conflicting expert and lay affidavits—requires the Court to cautiously heed the direction given by the Supreme Court, its master all judicial matters.

The Court's analysis has focused primarily on the Phototron's likelihood of success on its section 7 claim. Having found that Phototron has met its burden of persuasion in proving a likelihood of success on this claim, the Court mentions only in passing that Phototron bears a similar chance success on its claims arising under sections 1 and 2 or the Sherman Act. This likelihood of success on the Sherman Act claims rests on the Court's preliminary determination of the applicable product market. Based upon the limited record before the Court, it has found that the wholesale photo finishing market is the relevant one. The alleged 66 to 85 percent market share that the Kodak-Colorcraft combination would possess clearly evidences the type of combination, monopoly, or attempted monopolization that sections 1 and 2 of the Sherman Act prohibit.

For the reasons stated above, Phototron has sustained its burden of persuasion and shown that it has a substantial likelihood of success on the merits of its claim arising under section 7 of the Clay-

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[41] *See Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (verdict upheld against Kodak for monopolizing photographic material and supply markets); *United States v. Eastman Kodak Co.*, No. 6450, 1954 Trade Cas. (CCH) para. 67,920 (W.D.N.Y. Dec. 21, 1954) (consent decree eliminating Kodak processing charge included in purchase of film); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 299-305 (2d Cir. 1979) (upholding Kodak's violation of section 1 of the Sherman Act), *affirming in part*, 457 F. Supp. 404 (S.D.N.Y. 1978).

[42] 334 U.S. 131, 174 (1948).

ton Act.[43] Section 7 is designed to stop "mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency."[44]

2. Substantial Threat of Irreparable Injury

This "lessening of competition" is precisely the type of harm that Phototron and other remaining competitors are threatened with in the wholesale photo finishing marketplace. "Antitrust laws . . . were enacted for the protection of **competition,** not **competitors.**"[45] This threat of harm is significantly acerbated by (1) the predominant share of the wholesale photo finishing market the Kodak-Colorcraft combination would possess,[46] (2) the horizontal and vertical leverage in both the relevant and related markets that the combined entity could exercise, and indeed in the past has exercised, and (3) the prima facie showing made by Phototron that Kodak has priced its wholesale photo finishing services and raw materials below cost.

From this predation and loss of competition flows antitrust injury. Activities which threaten this form of injury are may be enjoined under section 16 of the Clayton Act if under similar circumstances a court of equity would grant injunctive relief.[47] An entitlement to injunctive relief requires a showing that the purported injury cannot

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[43] *See, e.g., Productos Carnic, S.A. v. Central American Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980) ("a showing of **some** likelihood of success on the merits will justify temporary injunctive relief") (emphasis original).

[44] *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 (1962).

[45] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S. Ct. 484, 489 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), and *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[46] The Court again emphasizes, in an overabundance of caution, that it refers only to the relevant product market as the Court has defined it for the limited purpose of determining whether preliminary injunctive relief should issue.

[47] 15 U.S.C.A. § 26 (West Supp. 1987).

be undone through monetary remedies.[48] As the movant, Phototron bore the burden of proving that monetary damages would not be an adequate remedy for the alleged antitrust injury.

Phototron has met that burden. Based on the limited record before the Court, the present situation demonstrates the threat of irreparable injury and no adequate legal remedy. Phototron is threatened with the loss of its business. As its verified complaint states, Phototron has already lost several major accounts. If this pattern persists, Phototron could go out of business, further reducing competition in an arguably already monopolized wholesale photo finishing market.

Over the last two years. Phototron has sustained substantial losses; sales have fallen nearly 50 percent. This limited record supports a finding that these losses may be attributable to the predatory pricing practices of Kodak and Colorcraft.[49] This inference is further sustained by the fact finding that Kodak occupies a dominant position in the conventional photographic film and the color print paper and chemicals markets. Both are major competitors in the wholesale photo finishing markets; if combined, no comparable competitor will exist on a national scale.

Two other factors which require injunctive relief must also be considered here in addition to Phototron's irreparable harm. First, Courts continue to struggle with the question of divestiture as a private remedy.[50] Second, Phototron and other competitors may close. Indeed, as a result of the Kodak-Colorcraft combination, the

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[48] *See, e.g., Interox America v. PPG Industries, Inc.*, 736 F.2d 194, 202 (5th Cir. 1984); *Spiegel v. City Houston*, 636 F.2d 997, 1001 (5th Cir. 1981).

[49] *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (injunctive relief is available "even though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust law or from a contemporary violation likely to continue or recur); *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986) (threatened loss of 50% of plaintiff's business entitled it to preliminary injunction).

[50] *Compare International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 920–25 (9th Cir. 1975) (no divestiture allowed) *with NBO Industries Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262, 278–79 (3d Cir. 1975), *vacated on other grounds*, 429 U.S. 477 (1977) (allowing divestiture).

Defendants will begin the "rationalization of production facilities and labor forces."[51] Jobs will be lost, physical assets sold, and commercial arrangements permanently altered. This is the sort of "scrambled eggs" that cannot be "unscrambled" through monetary damages.[52]

For the reasons stated above, Phototron has persuasively demonstrated the threat of irreparable harm if the proposed combination is not preliminarily enjoined.

3. Threatened Injury Versus the Damage of Injunctive Relief

Given the lengthy explication of its decision to grant injunctive relief, the Court will briefly address the remaining two elements required for the issuance of a preliminary injunction.

As noted above, the third required element is that the threatened injury to the movant outweigh any damage the injunction might cause the opponent. Here, this requirement poses little difficulty; Phototron has again met its burden of persuasion. The severe and potentially devastating injury threatened to competition in the wholesale photo finishing marketplace and to Phototron's ability to continue as a going concern far outweigh any damage that the injunction may cause the Defendants. The interest of the Defendants will be adequately protected by Phototron's posting of security to cover any losses that may result from an improper delay of the combination. As noted below in the Court's Order, a hearing to determine the amount of the bond has already been scheduled.

4. Preliminary Injunction Will Not Disserve the Public

The fourth requirement for the issuance of a preliminary injunction has also been met by Phototron; namely, that the injunction will not disserve the public interest. Clearly, preserving competition is the underlying purpose of the federal antitrust laws.[53] The public

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[51] Affidavit of William P. McCarrick at p. 4.

[52] *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (irreparable injury present when businesses would be closed).

[53] *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

has an interest in maintaining a free and open marketplace. In light of Phototron's prima facie showing of predation and antitrust jury here, this interest will be **preserved** by temporarily enjoining the proposed combination until the nature of the wholesale photo finishing market can be completely and fully examined.

ORDER

For the reasons set forth fully above, the Defendants Kodak, Fuqua, and Colorcraft are PRELIMINARILY ENJOINED from consummating their agreement to combine the photo finishing operations of Kodak and Colorcraft. A hearing is set for 2:00 p.m., Tuesday, February 23, 1988, to determine the amount of security to be provided by Phototron pursuant to Rule 65(c) of the Federal Rules of Civil Procedure.

Signed this 22nd day of February, 1988.

Eldon B. Mahon
United States District Judge

APPENDIX C

In The United States Court Of Appeals For The Fifth Circuit

No. 88-1128

D.C. Docket No. CA-4-87-910-E

PHOTOTRON CORPORATION,
Plaintiff-Appellee-Appellant,

vs.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC., and
COLORCRAFT CORPORATION,
Defendants-Appellants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

Before BROWN, GEE, and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee-appellant pay to defendants-appellants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

March 28, 1988

ISSUED AS MANDATE: March 29, 1988

APPENDIX D

In The United States Court Of Appeals For The Fifth Circuit

No. 88-1128

PHOTOTRON CORPORATION,
Plaintiff-Appellee-Appellant,

vs.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC., and
COLORCRAFT CORPORATION,
Defendants-Appellants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

Before BROWN, GEE and GARWOOD, Circuit Judges.

BY THE COURT:

Sua sponte the Court directs that the mandate in the above cause issue forthwith.

APPENDIX E

Clayton Antitrust Act § 7, 15 U.S.C. § 18

Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission or Secretary.

Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

No. 87-1634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHOTOTRON CORPORATION,

Petitioner,

v.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC., AND
COLORCRAFT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

MARVIN S. SLOMAN
Counsel of Record
FLETCHER L. YARBROUGH
TYLER A. BAKER
WILLIAM D. UNDERWOOD
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201

Counsel for Respondent Eastman Kodak Company

CHARLES E. KOOB
JOSEPH F. TRINGALI
KATHRYN A. CLOKEY
SIMPSON THACHER &
BARTLETT
One Battery Park Plaza
New York, New York 10004

E. GLEN JOHNSON
KELLY HART & HALLMAN
2500 First City Bank Tower
201 Main Street
Fort Worth, Texas 76102

Counsel for Respondents Fuqua Industries, Inc. and Colorcraft Corporation

37 pp

QUESTIONS PRESENTED

1. Has Phototron's request for a preliminary injunction to prevent the combination of the photofinishing businesses of Kodak and Colorcraft been rendered moot by the completion of that combination?

2. Does Phototron have standing under the antitrust laws to seek a preliminary injunction against the combination of the photofinishing businesses of Kodak and Colorcraft, two of its competitors, where it failed to establish a likelihood that the combination would engage in predatory conduct directed at Phototron?

LIST OF PARTIES

Phototron Corporation

Eastman Kodak Company

Subsidiaries and affiliates, other than wholly-owned subsidiaries, of Eastman Kodak Company:

Miller Bros. Hall & Company Limited
Photofinishers (Glasgow) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Stuart Photo Services Limited
Taylors Dev. & Printing Works Limited
Consumer Developments Limited
City Photo Limited
Ordinant S.A.R.L.
Verbatim Commercial Ltd.
P. T. Sterling Products Indonesia
Sterling Yamanouchi Pharmaceutical, Inc.
Dainichiseika-Sterling Co., Ltd.
Inrock Chemical Co., Ltd.
Sterling Drug Korea Limited
Sterling Products (Ghana) Limited
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Limited
Mackwoods-Winthrop Limited
Qualex Inc.*

Fuqua Industries, Inc.

Qualex Inc. is a non-wholly-owned subsidiary of Fuqua Industries, Inc.*

Colorcraft Corporation

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* Qualex is 51% owned by Fuqua Industries, Inc. and 49% owned by Eastman Kodak Company

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TABLE OF AUTHORITIES

ABBREVIATIONS

"Phototron" refers to petitioner, Phototron Corporation

"Kodak" refers to respondent Eastman Kodak Company

"Fuqua" refers to respondent Fuqua Industries, Inc.

"Colorcraft" refers to respondent Colorcraft Corporation

"Qualex" refers to Qualex Inc., the entity that resulted from the combination of Kodak's and Colorcraft's photofinishing businesses

No. 87-1634

Supreme Court of the United States

OCTOBER TERM, 1987

PHOTOTRON CORPORATION,

Petitioner,

v.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC., and
COLORCRAFT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully pray that the petition for writ of certiorari be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 842 F.2d 95. The typescript opinion of the court of appeals, reproduced as Appendix A to the petition for writ of certiorari (pp. A-1 – A-10) has been corrected by the court; the corrections in the opinion are reflected in the report at 842 F.2d 95, and in the opinion as reproduced in Appendix 1 hereto (cited herein as "A" followed by the relevant page number).

JURISDICTION

The courts below had jurisdiction of the subject matter, and the petition was timely filed in this Court. The subject matter of the petition, however, is moot.

STATEMENT OF THE CASE

Phototron operates wholesale photofinishing facilities that develop and print film exposed by amateur photographers. Before the formation of Qualex on March 29, 1988, Kodak and Colorwatch operated separate wholesale photofinishing facilities that competed with Phototron in certain locations. On March 29, those separate Kodak and Colorcraft operations were combined into Qualex. It is that combination which Phototron sought to enjoin; and it is the now moot preliminary injunction against the combination which is the subject of this petition.

Amateur photographers have several options for having their film developed. For one, they can take their film to retail establishments, such as camera, grocery, drug, and discount stores, that accept film for processing. Some of these retailers develop film themselves either on their premises or in off-site, captive laboratories. Others use wholesale photofinishers who pick up and develop the film, and then return the prints and negatives to the retailer. Consumers can also send their film by mail directly to processing laboratories that specialize in mail-order work. Or they can select the fastest growing segment of the photofinishing industry — retail minilabs.[1] Competition for the consumer's film process-

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[1] Minilabs are small retail outlets that specialize in photofinishing services from on-premises processing equipment.

There were virtually no minilabs in operation in 1980; today there are over 12,000. During the 1983-1986 period, minilabs grew from

ing business is intense among all of these businesses, and each directly affects the competitive behavior of the others.

Entry into this changing and highly competitive photofinishing market is both easy and rapid. All that is required to build a new wholesale-type processing laboratory is a relatively small commercial space and readily available equipment. Such a new wholesale-type laboratory can be completed in two to three months at a cost of $450,000. A minilab can be completed even faster for as little as $30,000. Adding additional equipment to existing facilities is even easier than construction of a new laboratory and often does not require additional space. Finally, entry can and does occur when vertically integrated laboratories serving affiliated retail outlets expand to solicit non-affiliated retail accounts.

Against this backdrop of vigorous competition and easy entry, Kodak and Fuqua agreed in the fall of 1987 to combine Colorcraft's and Kodak's photofinishing facilities in a new venture to be owned 51 percent by Fuqua and 49 percent by Kodak. On December 7, 1987, Kodak and Fuqua filed premerger notification materials with the Antitrust Division of the Department of Justice and the Federal Trade Commission pursuant to the Hart-Scott-Rodino Act. On December 24, 1987, the FTC cleared the merger, granting early termination of the statutory 30-day waiting period. The FTC's decision reflected the minimal effect the transaction would have on market concentration and competition.

The Kodak-Colorcraft transaction was originally scheduled to close on January 28, 1988. Seeking to block the closing,

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11 percent to 30 percent of total photofinishing as measured in value terms and from 6 percent to 22 percent as measured in terms of film processed.

Phototron filed this suit on December 21, 1988, alleging violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 7 of the Clayton Act, 15 U.S.C. § 18; and a pendent claim under Texas law. In addition to damages, Phototron requested preliminary and permanent injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26.

On January 21, 1988, Phototron moved for a preliminary injunction enjoining Kodak and Colorcraft from combining their photofinishing operations. After conferences with the district court, respondents agreed to delay the closing until after a hearing, set for February 5, 1988 on Phototron's application for a preliminary injunction. Pursuant to the parties' agreement, the hearing consisted of oral argument based upon affidavits and exhibits. After the February 5 hearing, the transaction was again postponed at the request of the district court to February 23, 1988.

On February 22, 1988, the district court filed a Memorandum Opinion and Order. Although admitting that the question was "close," the district court granted Phototron's application for a preliminary injunction. The district court found that Phototron had established standing under the antitrust laws to challenge the proposed merger by sufficiently pleading and proving that respondents had engaged in predatory pricing aimed at Phototron, and that the transaction would "enable" the combined entity to continue such practices in the future.[2]

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[2] In holding that the transaction was likely to violate the antitrust laws, the district court excluded from the market the competition from all sources of photofinishing other than wholesale photofinishing and ignored the undisputed evidence of easy entry. When all sources of photofinishing are considered, Kodak and Colorcraft each accounted for approximately 10 percent of the amateur photofinishing business in the United States. There are fifty other

Respondents immediately appealed from the district court's decision and moved for an expedited appeal, which was granted by the court of appeals.[3] On March 28, 1988, the court of appeals issued its opinion reversing the district court's preliminary injunction on the ground that petitioner lacked standing to obtain such an injunction.

The court of appeals concluded that the evidence submitted by petitioner to the district court was insufficient to establish a credible threat of predatory behavior by the combined Kodak-Colorcraft venture, and indeed affirmatively demonstrated that no such threat was present. 842 F.2d at 100 (A 7-8). The court of appeals correctly read *Cargill, Inc v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S.Ct. 484 (1986), as placing strict limits on the ability of private

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large photofinishing firms in the United States, none with a market share higher than 2.54 percent. The Kodak-Colorcraft transaction raised the level of market concentration, measured by the Herfindahl-Hirschman Index, only from about 400 to 600 or 700 — still well below the 1,000 "safe harbor" point for unconcentrated markets in the Department of Justice Merger Guidelines §§ 3.1, 3.11(a), 49 Fed. Reg. 26827, 26830-31 (1984).

Because of the lack of market concentration after the transaction, as well as the ease of entry or expansion into the market, it would be impossible for the new company formed by the Kodak-Colorcraft combination either to raise prices above competitive levels or to wage a successful predatory pricing campaign.

Because of its ruling on standing, the court of appeals did not reach the issue of market definition. Its discussion of the options available to consumers, however, suggests that it questioned the district court's artificially narrow market definition. See 842 F.2d at 94 (A 2).

[3] Respondents' motion was based on undisputed evidence that the proposed transaction was unlikely to survive unless it could close in the period between the Christmas rush and the spring photofinishing surge.

antitrust plaintiffs to challenge combinations between their competitors. Contrary to petitioner's assertion, the court did not hold that a competitor may not challenge "monopolistic conduct forcing it from the market." (Petition at i) Rather, it found insufficient record evidence that the challenged venture would engage in anticompetitive conduct that would force petitioner from the market or otherwise cause an antitrust injury to it.[4]

Apparently recognizing that further delay would likely cause the transaction to fail and thereby thwart its decision, the court of appeals *sua sponte* directed that the mandate issue forthwith.[5] When respondents learned on March 29, 1988 that the mandate had issued, they proceeded to consummate the merger that same day. The following morning, respondents issued a press release announcing the merger and advised the court below and petitioner, each by telecopied letter, that the transaction had closed.

On March 30, 1988, after the mandate had issued and respondents' transaction had closed, petitioner filed its mo-

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[4] Petitioner relies heavily on a phrase from the court of appeals typescript opinion that Phototron had to show a "likelihood of *having suffered* an antitrust injury." (Petition at 5, 14) (emphasis added) In its final published opinion the court below corrected the phrase to require that a competitor show a "likelihood of suffering an antitrust injury." 842 F.2d at 98 (A 4).

The correction is consistent with the court's Conclusion requiring "a substantial likelihood that the plaintiff *will be* injured." 842 F.2d at 102 (A 12) (emphasis added).

[5] Without knowledge of the court's order, respondents on March 28, 1988 served, and the next morning filed, a motion for immediate issuance of the mandate.

tion for recall of the mandate. The court denied the motion on March 31, 1988.

On March 31, 1988, while petitioner's motion for recall of the mandate was still pending in the court of appeals, petitioner filed an application in this Court for recall and stay of the mandate pending consideration of petitioner's certiorari petition to be filed April 4, 1988. Petitioner's application failed to disclose that the transaction petitioner sought to enjoin had already been closed. Justice White entered a temporary order recalling and staying the mandate pending receipt of responses to petitioner's application. Respondents immediately filed a motion to vacate the temporary stay, informing the Court that the transaction had in fact already been closed. The following morning, on April 1, 1988, respondents filed a complete response to petitioner's application.

Justice White then vacated his earlier order and denied petitioner's application for a stay in all respects. In denying petitioner's application, Justice White noted that the transaction had actually been closed before the temporary stay was issued and that he had not been aware of that closing at the time he entered the stay. On April 1, 1988, petitioner reapplied to Justice Brennan to recall and stay the mandate. That reapplication was denied on April 4, 1988.

The petition for writ of certiorari was filed on April 4, 1988.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The subject matter of this petition, petitioner's request for a preliminary injunction restraining the combination of the wholesale photofinishing businesses of Kodak and Colorcraft, has been rendered moot by the completion of that combination. For this Court to take the case to decide if the court of

appeals correctly denied petitioner's standing to seek such an injunction would result in an advisory opinion affecting no rights of the parties. Under Article III of the Constitution this Court will not decide moot questions, and the petition should be denied on the ground of mootness alone.

Quite apart from mootness, however, the questions presented by petitioner are not appropriate for review on certiorari. Faithfully applying this Court's recent decision in *Cargill*, the court of appeals found that petitioner had failed to establish a likelihood that the proposed combination would engage in any kind of predatory conduct that would harm petitioner. Petitioner's true disagreement with this holding is not on the law, but on the court's interpretation of the evidence. This case is fact specific, and the question presented is not ripe for review because it involves a recent decision of this Court as to which there is no conflict between circuits. Nor will the decision of the court of appeals impair private enforcement of the merger laws because, in addition to competitors who do have standing under *Cargill* in an appropriate case, both customers and suppliers of a merged entity continue to have the incentive and the right to sue. Accordingly, this case is inappropriate for review in this Court.

ARGUMENT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE MOOT

The order of the district court that is the subject of this petition preliminarily enjoined respondents from "consummating their agreement to combine the photofinishing opera-

tions of Kodak and Colorcraft." (Petition, App. B, at A-32)[6] That agreement was consummated after the judgment and mandate of the court below had issued and before the filing of the petition for writ of certiorari.[7] The question of whether the preliminary injunction should have issued is accordingly moot.[8]

The requirement of a justiciable controversy is at the core of the Court's power under Article III of the Constitution. The Court will not decide moot questions. *University of Texas v. Camenisch*, 451 U.S. 390 (1981). The Court has made clear that an actual live controversy must exist at all stages of appellate or certiorari review, not merely at the time the complaint is filed. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

The principal consideration in the analysis of mootness is "whether any effective purpose can still be served by a specific remedy." 13A Wright, Miller & Cooper, *Federal*

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[6] Petitioner did not appeal from the order entered by the district court and cannot argue for a broader injunction in this Court. The possibility that petitioner might ask the district court to grant further relief does not avoid the mootness of the appeal of the relief that *was* granted. *In re Cantwell*, 639 F.2d 1050, 1054 (3rd Cir. 1981).

[7] The facts concerning the closing of the transaction and the subsequent steps that have been and are being taken by respondents effecting the consolidation of their operations are set forth in the affidavits of George Bears and Lawrence Klamon, which were filed by respondents in this Court on April 1, 1988 in support of their Response to Motion for Stay or Recall of Mandate.

[8] Counsel have a duty to advise the Court of the mootness of an issue, no matter when it arises. *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985). The appropriate method for a respondent to raise the issue of mootness is in its response to the petition for certiorari. Sup. Ct. R. 22.3

Practice and Procedure § 3533.1 (1984). The federal courts generally will dismiss an appeal as moot "when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief." *In re Cantwell*, 639 F.2d 1050, 1053 (3rd Cir. 1981); *accord In re Combined Metals Reduction Co.*, 557 F.2d 179, 187 (9th Cir. 1977). "Thus, where, pending appeal, an act or event sought to be enjoined has been performed or has occurred, an appeal from the denial of the injunction will be dismissed as moot." *In re Cantwell*, 639 F.2d at 1054.[9] These principles were recently applied in the merger context in *FTC v. Owens-Illinois, Inc.*, No. 88-5048 (D.C. Cir. April 8, 1988) (appeal from denial of preliminary injunction moot where merger sought to be enjoined under antitrust laws was already consummated).

The present case falls squarely within the above principles. The event sought to be enjoined was the consummation of the agreement for the proposed combination. With the approval of the court of appeals, that consummation has occurred. Accordingly, for this Court to take this case to decide if the court of appeals was correct or incorrect in its decision

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[9] Other cases in this Court and in the circuits support this basic proposition. *See, e.g., Brockington v. Rhodes*, 396 U.S. 41, 43 (1969) (election had already been held); *Sawyer v. Pioneer Mill Co.*, 300 F.2d 200, 202 (9th Cir.), *cert. denied*, 371 U.S. 814 (1962) (action to prevent use of proxies solicited through allegedly misleading proxy statement rendered moot by holding of stockholder meeting and approval of merger); *Fink v. Continental Foundry & Machine Co.*, 240 F.2d 369, 374 (7th Cir.), *cert. denied*, 354 U.S. 938 (1957) (action by stockholders to enjoin sale of assets and liquidation rendered moot when sale was completed pending appeal); *Brill v. General Industrial Enterprises Inc.*, 234 F.2d 465, 469 (3d Cir. 1956) (stockholders' action to enjoin sale of corporate assets which allegedly violated antitrust laws rendered moot by consummation of sale after dismissal and prior to filing of appeal).

would result in an advisory opinion affecting no rights of the parties.

This case does not involve the recognized exception to mootness for issues that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). That exception is typically applied where government regulations are likely to be enforced repeatedly, but involve subject matters that inherently have such a short time dimension that appellate review is impossible during the pendency of any particular dispute. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). No such consideration is pertinent to the present case.[10] In light of the large number of merger cases, there will no doubt be many cases (such as *Cargill* itself) presented for review that are not moot.

Petitioner argues that respondents acted improperly in closing the transaction before the district court had physically received the mandate. (Petition at 6, n. 7) The mandate, however, neither required nor contemplated any action by the district court; the court of appeals specifically "looked beyond a remand," in order "to render a final decision" on the preliminary injunction issue. 842 F.2d at 99 (A 5). The order of the court of appeals reversing the preliminary injunction was thus effective when the mandate issued. Respondents were under no obligation to wait until the United

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[10] The venture between Kodak and Colorcraft is a highly individualized business transaction. Petitioner has made no showing that any further transaction of this type is likely to occur or that petitioner would be affected if it did occur. The evading review exception cannot be used to avoid mootness based on "speculative contingencies." *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985); *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974) (citing cases).

States Postal Service delivered the piece of paper to the district court. If the mootness of this proceeding is to be attributed to any party, it is Phototron which failed to seek a stay more promptly.[11]

Petitioner's standing is not properly before this Court for review, and the petition should be denied on the ground of mootness alone.

II. The Questions Presented Are Not Appropriate For Review

Even if the questions presented by petitioner were not moot, those questions are not appropriate for review by the Court. This is the first court of appeals case since the Court's decision in *Cargill* to apply the rule and the antitrust policy of that decision; accordingly it presents no conflict with any decision of another lower court. It is certainly far too early for the Court to reconsider *Cargill,* which is petitioner's true objective. Moreover, the decision below is fact specific. The court of appeals denied petitioner's standing to obtain a preliminary injunction because of the failure of petitioner's evidence to bring petitioner within *Cargill's* requirements. The case does not present any issue of the kind reflected in Supreme Court Rule 17, any new issue of national policy, or any question concerning interpretation or application of the Court's holding in *Cargill* that would justify its attention.

Petitioner argues that the court of appeals "fundamentally misapprehended" *Cargill.* (Petition at 8) Demonstrably it did

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[11] Such a failure is a relevant consideration in evaluating mootness. *See In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977). At the conclusion of oral argument in the court of appeals, respondents requested that the court act as promptly as possible for the reasons set forth in note 3. Petitioner made no request of the court concerning issuance of the mandate.

not. In *Cargill* this Court extended its earlier decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) to actions for injunctive relief under Section 16 of the Clayton Act, holding that a private plaintiff seeking an injunction "must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.' " 107 S. Ct. at 491 (quoting *Brunswick*, 429 U.S. at 489). Thus, "a threat of a loss of profits stemming from the possibility that [the defendant], after the merger, would lower its prices to a level at or only slightly above its costs" would not constitute antitrust injury. 107 S. Ct. at 491-93.

Repeating the frequently-cited admonition that the antitrust laws were enacted for "the protection of *competition*, not *competitors*," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original), the Court observed in *Cargill* that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws" and that lower prices as a result of competition were not such a practice. 107 S. Ct. at 492. The Court therefore concluded that a competitor may only sustain antitrust injury and thus have the requisite standing to seek injunctive relief under the antitrust laws when the party is threatened with anticompetitive practices directed at it, such as predatory pricing by the merged firm. 107 S. Ct. at 495.

In the instant case, the court of appeals properly applied this Court's holding in *Cargill* to the facts before it. Petitioner quarrels with a phrase in the court's typescript opinion (Appendix A to Petition, at A 4) that "[t]he district court erred in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likeli-

hood of *having suffered* an antitrust injury." (Petition at 5, 14) This statement, however, was changed in the court's final published opinion to require that petitioner have demonstrated "a substantial likelihood of suffering an antitrust injury," as a result of the formation of Qualex. 842 F.2d at 98 (A 4). This change makes the phrase consistent with the court's clear conclusion:

> *Cargill* has imposed significant barriers to competitor attempts to enjoin merger transactions. To obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff *will be* injured. Proof that an entity *will commit* bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

842 F.2d at 102 (A 12) (emphasis added).

Under this correct standard the court of appeals examined each of petitioner's claims that it would be injured as a result of alleged anticompetitive conduct after the formation of Qualex. The very fact that the court considered each of these issues makes it clear that it did not require petitioner to show that it had already been injured.

Petitioner is also incorrect in asserting that the court below held that a competitor may not challenge "monopolistic conduct forcing it from the market." (Petition at 8) Rather, the court held that "to obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will

be injured." 842 F.2d at 102 (A 12). It found that, as a matter of fact, not theory, petitioner had failed to demonstrate a substantial likelihood of success in establishing that it was threatened with an antitrust injury arising out of any of the alleged anticompetitive conduct petitioner claimed would flow from the formation and operation of Qualex. 842 F.2d at 100-101 (A 7-10). In particular, the court considered whether petitioner had established a substantial likelihood that it was threatened with alleged predatory pricing by Qualex. The court concluded that, as a matter of fact, petitioner had failed to provide the evidence that this Court held in *Cargill* would give it standing, and in fact had shown the contrary. 842 F.2d at 99-100 (A 7-8).

With respect to petitioner's claim that Kodak was discriminating against it in the sale of paper and chemicals the court of appeals correctly concluded that the new venture would not sell paper and chemicals, and that as a result any claim for price discrimination was independent of any claim against the venture that petitioner sought to enjoin.[12]

Petitioner argues that a high market share by the merged firm is sufficient to confer standing on a competitor. The court below correctly held, however, that to enjoin a merger, a competitor must show that it is threatened by monopolistic *conduct* and not merely allege that the merged firm will

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[12] The court below also considered a variety of claims not dealt with by the district court, including petitioner's claims that it was threatened with antitrust injury arising out of alleged limit pricing, massive advertising, and foreclosure of independent couriers. The court concluded that these claims either did not involve conduct of Qualex or had not been proved. 842 F.2d at 101 (A 9-11).

None of these points are addressed by Phototron in its petition as a basis for granting the writ.

possess a market share sufficient to evidence monopoly power. Market share alone does not constitute unlawful monopolization. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

The principal concern of merger law is that excessive concentration of the market will lead to an increase in price to consumers above the competitive level. This concern is the same whether the market contains several large firms or one. In either case, the fact remains that a competitor such as petitioner cannot be harmed by even an illegal merger in the absence of predatory conduct directed at it, because an increase in price can only benefit a firm that is already in the market. *See* Note, *Horizontal Mergers, Competitors and Antitrust Standing Under Section 16 of the Clayton Act; Fruitless Searches for Antitrust Injury*, 70 Minn. L. Rev. 931, 948 (1986).

Moreover, requiring a competitor-plaintiff to show a threat of monopolistic conduct ensures that the competitor is a proper plaintiff and not simply manipulating the antitrust laws to impede competition. "Courts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition. Mergers that promote efficiency and lower prices in the marketplace, for example, may cause economic loss to competitors." *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987); *see also Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); Baumol and Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247 (1985); Hovenkamp, *Merger Action for Damages*, 35 Hastings L. Rev., 937, 956 (1984).

Thus, as the court below held, petitioner needed to show something more than Qualex's market share.[13] It did not do so. A competitor's standing to challenge a merger between its competitors does not vary based on the merged entity's market share, but rather, as the Court made clear in *Cargill*, turns on whether the competitor will suffer "antitrust injury" as a result of the merger. This requires a showing that predatory behavior by the combined entities is likely to be directed at competitors. There was no such a showing in this case.

The decision of the court of appeals will not, as petitioner contends, impair private enforcement of the merger laws. The decision below does not impose restrictions more onerous than *Cargill*, which itself recognized a role for the competitor-plaintiff under appropriate circumstances. And nothing in *Cargill* or in the decision below affects the right of suppliers or customers of the merged firm to challenge a suspect combination. In the four months from the public announcement to the closing of the transaction in this case no customer, no supplier, and indeed no governmental agency, has asserted any antitrust harm flowing from respondents' venture.

As is apparent from the foregoing discussion, petitioner's true disagreement with the court below is not on the law, but on that court's interpretation of the evidence in light of *Cargill*. Rather than resolving any important legal controversy, the court of appeals simply found that petitioner was not entitled to injunctive relief at this preliminary stage of the proceedings because petitioner's evidence was insufficient to establish a credible threat of predatory conduct, but

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[13] The suspect "wholesale photofinishing" market that was found by the district court was questioned by the court below. See note 2, above.

rather affirmatively demonstrated that no such threat was present. This Court does "not grant certoriari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981). Given the absence of conflict between the decision of the court below and that of any other court, as well as the lack of an important legal controversy, a writ of certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARVIN S. SLOMAN
Counsel of Record
FLETCHER L. YARBROUGH
TYLER A. BAKER
WILLIAM D. UNDERWOOD
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201

Counsel for Respondent Eastman Kodak Company

CHARLES E. KOOB
JOSEPH F. TRINGALI
KATHRYN A. CLOKEY
SIMPSON THACHER &
BARTLETT
One Battery Park Plaza
New York, New York 10004

E. GLEN JOHNSON
KELLY HART & HALLMAN
2500 First City Bank Tower
201 Main Street
Fort Worth, Texas 76102

Counsel for Respondents Fuqua Industries, Inc. and Colorcraft Corporation

APPENDIX I

PHOTOTRON CORPORATION,
Plaintiff-Appellee,

v.

EASTMAN KODAK COMPANY,
Fuqua Industries, Inc., and Colorcraft Corporation,
Defendants-Appellants,

No. 88-1128.

United States Court of Appeals,
Fifth Circuit.

March 28, 1988.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Eastman Kodak Company ("Kodak"), Fuqua Industries and Colorcraft Corporation appeal the granting of a preliminary injunction against Kodak's merger with Colorcraft Corporation, a subsidiary of Fuqua Industries, Inc. After reviewing the record and carefully considering the arguments presented by the parties we reverse the order of the district court.

Facts

The defendants in this action, Colorcraft and Kodak, have reached an agreement to combine their photofinishing facilities throughout the United States. Colorcraft operates forty-

one film processing plants, and Kodak has fifty such labs. The plaintiff in this suit, Phototron, processes film at nine plants in the southern and western United States.

These plants provide processing for amateurs' photographic film; Colorcraft, Kodak and Phototron have accounts with large and small retailers who receive film directly from the public. More than ten years ago, the photo processing market offered consumers two choices: either give film to a retailer who would then send the film to a wholesale processor, or use a mail-order service. The recent appearances of photo minilabs and of a trend toward vertical integration by large retailers such as Eckerd Drugs and Wal-Mart have significantly changed market relationships. Although the parties dispute the proper definition of the relevant market for this antitrust action, certainly many consumers — enjoying the wider range of options brought by advancing technology — have altered the manner in which they have their film processed. The more impatient customers, for example, pay extra for the convenience of having their film back in an hour. In 1980, there were few minilabs in operation; today there are over 12,000. As affidavits in the record show, by 1986 minilabs accounted for thirty percent of the entire value and twenty-two percent of the volume of photofinishing services.

Wholesale labs have had to adapt to these changing market circumstances. Colorcraft now processes most of its orders overnight. Some large general retailers have chosen to integrate by installing minilabs on their premises. Many customers are no longer willing to wait a week for their pictures. Against this backdrop, Kodak and Colorcraft have agreed to merge their photofinishing facilities.

Proceedings

Phototron Corporation brought this action seeking, in part, to enjoin the merger of Kodak's and Colorcraft's photofinishing labs.[1] The district court granted a hearing in early February to consider Phototron's application for a preliminary injunction. At the request of the district court, the merger was postponed until February 23, 1988; and on February 22 the district court granted a preliminary injunction.

The record before the district court consisted of affidavits filed by the parties and the oral arguments heard in early February. In his Memorandum Opinion, Judge Mahon found that:

(1) Phototron has standing to challenge the merger;

(2) wholesale photofinishing is the relevant market;

(3) the merger may substantially lessen competition in the relevant market;

(4) the grant of preliminary injunction is appropriate given the threat of loss and damages Phototron may suffer.

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[1] Kodak and Fuqua filed pre-merger notification materials on December 7, 1987 with the FTC and the Antitrust Division of the Justice Department pursuant to the Hart-Scott-Rodino Act. Phototron filed this action on December 21, 1987, three days before the FTC cleared the merger. In its complaint, Phototron alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Section 7 of the Clayton Act, 15 U.S.C. § 18, and state law. For relief, Phototron seeks $100 million in actual damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, and an injunction under Section 16 of the Clayton Act.

Issues

Kodak challenges the district court's rulings on standing and the relevant market. Our decision on the standing issue, however, forecloses the need to take up the more difficult relevant market issue.

Before setting forth the strict standing requirements, we remind ourselves of a well established principle: a preliminary injunction can be granted only when the district court has found "a substantial likelihood that plaintiff will prevail on the merits." *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). One of the merits issues that must be decided at trial is whether Phototron has suffered an antitrust injury, for without such an injury, Phototron lacks standing to sue. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. ——, ——, 107 S.Ct. 484, 491, 93 L.Ed.2d 427, 438 (1986). The district court therefore erred in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likelihood of suffering an antitrust injury. The district court correctly noted that no rigorous proof of antitrust injury was necessary at this early stage of consideration.[2] Given the onerous effects of granting a preliminary injunction, however, more than mere pleading is necessary to establish standing even at this stage. Because the district

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[2] The district court stated:

> Only the issue of *preliminary* injunctive relief is before the Court . . . . Phototron must allege an antitrust injury which flows from the proposed Kodak-Colorcraft combination and sustain only that burden of proof which would entitle it to *preliminary*, not permanent injunctive relief.

Mem. Op. at 15.

court determined that the pleadings sufficed standing alone,[3] we must, at the least, remand the case for a determination whether there is a substantial likelihood that Phototron will be able to prove antitrust injury at trial. Given the need for us to render a final decision on this issue, we look beyond a remand and review the record to determine whether we can make the "substantial likelihood" determination ourselves.

In *Cargill*, the Supreme Court decided that a competitor could obtain a permanent injunction against a merger by meeting the same standing requirement that the Court articulated earlier in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). *Brunswick* allows treble damage recovery under Section 7 of the Clayton Act only when plaintiffs have shown antitrust injury:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

429 U.S. at 489, 97 S.Ct. at 697.

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[3] The district court initially indicated that it would decide whether Phototron was likely to succeed on the standing issue.

> Phototron has made the requisite allegations in its Complaint and, as will be seen in Part II(b) of this Opinion, made the applicable showing required for equitable injunctive relief.

Mem.Op. at 15-16. Part II(B), however, never addresses the standing issue, but rather focuses only on the likelihood of success on the statutory claims. The merits of any case embody several elements that the plaintiff must prove to prevail at trial. In this case, those elements are: 1) standing, 2) establishing the relevant market, and 3) one or more of the substantive claims (e.g. Clayton Act § 7, Sherman Act §§ 1 and 2).

This burden on the private plaintiff is a significant one, and the Supreme Court's decision to make it such was aptly noted in Justice Stevens' dissent in *Cargill*:

> This case presents the question of whether the antitrust laws provide a remedy for a private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the post merger conduct of the merging firms and deny relief unless the plaintiff can prove a violation of the Sherman Act. Second, the Court might concentrate on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path.

479 U.S. at ____, 107 S.Ct. at 496, 93 L.Ed 2d. at 443-44. Bound by precedent, we follow the Supreme Court's tracks.

Under *Cargill*, a competitor of two merging entities has standing to challenge the merger if an allegation and proof of predatory pricing is made. In its complaint, Phototron alleges that Kodak and Colorcraft have provided photofinishing services at below cost; specifically, the complaint asserts that the companies have been operating their wholesale labs "unprofitably or at substantially reduced profit margins for at least the short term, until plaintiff is forced to go out of business or sell to defendants or their surrogates." "Operating ... at substantially reduced profit margins," however, is not equivalent to pricing in a predatory manner, it is simply pricing in a competitive manner. An allegation that one is operating "unprofitably" comes close to alleging predatory

pricing.[4] We withhold a determination of how precisely predatory pricing must be alleged in order to assert an antitrust injury, turning instead to the easier conclusion that Phototron has not demonstrated a substantial likelihood of prevailing on its allegation at trial.

Phototron alleges carefully that Kodak and Colorcraft were operating unprofitably because they "have charged prices for photofinishing services to actual and potential retail customers of plaintiff that are substantially below the prices *plaintiff* can charge and still operate profitably" (emphasis added). The sentence's conclusion does not, of course, necessarily follow from its stated premises. To satisfy the "substantial likelihood" requirement for preliminary injunctive relief, Phototron must present some evidence that Kodak or Colorcraft has sold photofinishing services below *its* cost. In his affidavit, the president of Phototron asserts that Kodak and Colorcraft have been able to undercut the price Phototron offers retailers by "operating at a loss, or [ ] receiving discounts from Kodak on color print paper or chemicals." This "evidence" — sufficient in form for this matter in limine — merely restates the allegation. It affords no showing that Kodak or Colorcraft are actually doing that which Phototron suspects they are doing. To the contrary, Phototron offered evidence of Colorcraft's profitability in 1986, and the price of developing through Kodak labs is among the highest

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[4] Kodak urges us to find that "operating unprofitably" is not sufficient for asserting predatory pricing. Our Circuit defines predatory pricing as pricing below marginal or average variable cost. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833, 105 S.Ct. 123, 83 L.Ed.2d 65 (1984). The Supreme Court has not given a pinpoint definition of predatory pricing; it has thus far settled for the vague term "pricing below cost."

in the industry.[5] We see no likelihood that Phototron would prevail on the merits of its predatory pricing allegation; much evidence, however, suggests that it would not. Accordingly, Phototron has failed to establish standing under a predatory pricing theory.

Phototron argues that other evidence of predatory behavior by Kodak and Colorcraft constitutes antitrust injury. Although the district court made no such findings, we shall address Phototron's concerns individually.

1. *Threat of Monopolistic Behavior*

Phototron boldly asserts that "[t]he competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." This facially sensible proposition has been undermined by *Cargill*. In *Cargill*, the Court required that the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury. Phototron suggests that the merits of the Kodak-Colorcraft merger are an important consideration in determining standing. As its brief forcefully states: "The monopoly created by the combination of the two largest current competitors clearly threatens to destroy any remaining competitors, including Phototron. Certainly the antitrust laws, which prohibit monopolies, allow a competitor that will be destroyed by a monopolist to use those laws for protection." As Justice Stevens noted in his dissent in *Cargill*, however, the Supreme Court will not grant relief if there is

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[5] Fuqua's 1986 Annual Report — which was submitted in evidence by Phototron — states that "Colorcraft's earnings increased for the fifth consecutive year, up 33% in 1986 and 12% in 1985.... Profit margins as a percentage of sales declined in 1985 because of the acquisition of Berkey operations but improved in 1986 primarily from economies gained by eliminating duplicate expenses of Colorcraft and Berkey."

simply "a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." 479 U.S. at ——, 107 S.Ct. at 496, 93 L.Ed.2d at 444. Therefore, the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.

2. *Massive Use of Advertising*

Phototron urges us to find that massive use of advertising and promotion by the merging companies will exclude competition. Advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent. "A monoplist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2nd Cir.1979).

Phototron supports its advertising injury assertion by pointing to the "advertising-driven Colorwatch program." Despite its complaints regarding the Colorwatch system,[6] Phototron has failed to provide any evidence showing that it has a substantial likelihood of proving this injury at trial. Colorwatch is *not* advertising by the wholesale photofinishers; it is a marketing program aimed at the public through retailers but undertaken by a supplier of materials to whole-

[6] "Colorwatch" is a service mark that retailers display indicating that customers may have their film sent to participating Colorwatch processors where film is developed under quality standards on Kodak-brand paper. A Colorwatch wholesale processor must abide by the quality standards set by Kodak and only use Kodak paper and chemicals in its plant. Of course, other plants operated by the wholesaler may use any paper and chemicals it chooses, even Kodak supplies. No special discount is given by Kodak on paper and chemicals to Colorwatch participants.

sale photofinishers. In this instance, the supplier happens to be Kodak. Phototron certainly would not attempt to stop this merger if Colorwatch were instead a marketing system developed by another supplier of paper and chemicals to wholesale photofinishers. Even more revealing, the success of wholesale photofinishing is not tied to being a participant in Colorwatch: Colorcraft has been enormously profitable in the past few years when it has *not* been a member of the Colorwatch program. Phototron may have a monopoly or price discrimination action against Kodak as a manufacturer of chemicals and paper, but it cannot use the perceived anticompetitive effects of Colorwatch to challenge this merger. Without evidence of how advertising in the wholesale photofinishing industry can act as a barrier to Phototron's participation in the industry, we cannot conclude that Phototron is likely to succeed on this theory of predation.

3. *Limit Pricing*

Setting one's price at a level just below that which a prospective entrant to the market would need to charge in order to sustain a successful entry is often referred to as "limit pricing." As noted in *Dimmitt Agri Industries, Inc. v. CPC Intern, Inc.*, 679 F.2d 516 (5th Cir.1982), this practice clearly evinces monopolistic intent. In *Dimmitt*, the plaintiffs introduced clear evidence that "the company was out to exclude other competitors from the market." 679 F.2d at 524. Kodak contends that, as a matter of law, a company already competing in an industry can never allege limit pricing in order to establish antitrust injury because "a limit price, like a monopoly price, is still set at a supra competitive level[;] it can never hurt a competitor that is already in the market." We defer judgment on this contention to a later time. Nonetheless, no evidence in the record supports the allegation of

limit pricing, and, as we have said above, without more than a mere allegation, Phototron cannot have standing.[7]

4. *Independent Carriers*

Phototron contends that the merger will deny competitors access to the market by foreclosing access to independent couriers. This argument clearly lacks merit. Although Kodak will be able to suspend its use of much courier service when it combines its operations with Colorcraft, Phototron will suffer no injury. The courier industry requires neither a large capital investment nor a large consumer base. Newspaper delivery boys are as available in Bugtussle, Texas, as they are in Los Angeles, California. Phototron has presented no evidence to the contrary.

5. *Vertical Integration*

Kodak's domination of the color film and color print paper and chemicals markets is the final source of injury that Phototron asserts. Phototron argues that Kodak's dominant position in the supply markets will allow it to "manipulate prices and other terms of sale of these products so that independent wholesale photofinishers are at a distinct disadvantage in competing with wholesale photofinishers owned or controlled by Kodak." Phototron's fear of price discrimination is understandable; its attempt to address this fear by stopping this merger is, however, misdirected. If Kodak is

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[7] Phototron's president claims that Kodak has stated to some of Phototron's major retail accounts that "Phototron will be sold or will go out of business." This speculation by Kodak is not proof of limit pricing; it may simply be a recognition that Phototron is no longer a viable competitor. Antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962).

manipulating prices on the sale of its paper and chemicals to customers, then a price discrimination suit should be brought against Kodak, not against this merging entity.

Conclusion

Cargill has imposed significant barriers to competitor attempts to enjoin merger transactions. To obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured. Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

Preliminary injunctions are extraordinary remedies. The Supreme Court has recognized the danger of granting injunctive relief to parties who are not injured by a merger. That concern, expressed in *Cargill*, must inform our decision today. The order of the district court is

REVERSED.

No. 87-1634

In the

Supreme Court of the United States

October Term, 1987

PHOTOTRON CORPORATION,

Petitioner,

v.

EASTMAN KODAK COMPANY, FUQUA INDUSTRIES, INC., and COLORCRAFT CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

DANIEL R. SHULMAN
David M. Coyne
Quentin R. Wittrock
Gray, Plant, Mooty, Mooty & Bennett, P.A.
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (612) 343-2800

RICHARD LEE BROWN
S. Gary Werley
Bishop, Payne, Lamsens & Brown
Eighteenth Floor
First Interstate Bank
One Burnett Plaza
Fort Worth, Texas 76102
Telephone: (817) 335-4911

JOSEPH M. ALIOTO
Alioto & Alioto
Twenty-Third Floor
650 California Street
San Francisco, California 94108
Telephone: (415) 434-2100

Attorneys for Petitioner

1988 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

Phototron Corporation ("Phototron") submits this Reply Brief in Support of its Petition for Writ of Certiorari, pursuant to United States Supreme Court Rule 22.5. In this reply, Phototron will address two points. First, by amending its decision after the filing of Phototron's Petition for Writ of Certiorari in this Court, the United States Court of Appeals for the Fifth Circuit has not corrected the fundamental error in the decision for which review is sought. Second, by "consummating" their merger, respondents have neither deprived Phototron of its right to obtain review in this Court, nor precluded this Court from reviewing this case and granting appropriate relief—respondents have not mooted this controversy.

I. THE AMENDMENT OF THE DECISION BELOW DOES NOT CURE ITS FUNDAMENTAL ERROR

In its decision, as originally issued, the Fifth Circuit required a plaintiff seeking a preliminary injunction against a proposed merger to demonstrate, first, "a substantial likelihood of **having suffered** an antitrust injury." Appendix ("App.") A to Petition, at A-4 (emphasis added). After Phototron filed its petition, courtesy copies of which were provided to the Fifth Circuit panel, the court amended its decision so that the language at issue required proof of "a substantial likelihood of **suffering** an antitrust injury." App. F to Reply, at A-42. (Pages are numbered consecutively with App. to Petition.)

Although this change by the Fifth Circuit constitutes a significant admission of the fundamental error in the original decision, the correction does not cure that error. The underlying tenor and overall thrust of the Fifth Circuit's decision remain that for Phototron to have obtained a preliminary injunction against the merger at issue, Phototron had, first, to produce evidence that it had suffered or was already suffering an antitrust injury. In other words, Phototron could not obtain a preliminary injunction against the merger merely by showing, as provided by Section 7 of the Clayton Act, 15 U.S.C. § 18, that the effect of the merger "**may be** substantially to lessen competition, or to tend to create a monopoly," or that such "a violation of the antitrust laws" presented "**threatened** loss or damage" to Phototron, as provided by Section 16 of the Clayton Act, 15 U.S.C. § 26 (emphasis added).

By changing clearly erroneous language in its decision, the Fifth Circuit has not altered the decision's basic disregard of the prospective elements of Sections 7 and 16 of the Clayton Act, in contravention of those statutes and this Court's decisions. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *United States v. Continental Can Co.*, 378 U.S. 441 (1964).

II. RESPONDENTS' CONDUCT HAS NOT MOOTED THIS PETITION

Respondents now make the argument that this petition is moot and presents no justiciable case or controversy because respondents have already consummated the merger sought to be enjoined. The issue this argument raises is, quite simply, whether by illegal conduct an antitrust defendant may foreclose both the plaintiff's right to obtain review in this Court, and this Court's power to review and grant appropriate relief against antitrust violations.

For two reasons, this controversy is not moot. First, defendants who take actions that are under attack in proceedings seeking injunctive relief do so at their peril. Such actions may always be undone. Second, the "consummation" of the merger under challenge here occurred while the district court's injunction was still in effect, before the Fifth Circuit's mandate had been received and entered in the district court. The merger itself was an illegal act.

As this Court has expressly held, when defendants proceed to consummate a transaction with knowledge that an injunction is sought against that transaction, whether in an antitrust case or otherwise, the federal courts have full power to unravel the transaction and restore the status quo if they find it to be unlawful, as here—the respondents proceed at their peril. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964). "It has long been established that where a defendant with notice of an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter v. Lee*, 328 U.S. 246, 251 (1946); *Texas & N.O. R.R. v. Northside Belt Ry.*, 276 U.S. 475, 479 (1928); *F. Alderete Gen. Contractors, Inc. v. U.S.*, 715 F.2d 1476, 1480 (Fed. Cir. 1983); *F.T.C. v. Weyerhaeuser Co.*, 648 F.2d 739, 741 (D.C. Cir.), *vacated on other grounds*, 665 F.2d 1072 (D.C. Cir. 1981); *Bastian v. Lakefront Realty Corp.*, 581 F.2d 685, 691 (7th Cir. 1978).

Second, the "consummation" of the merger itself is an illegal effort to deprive Phototron of its right to obtain review, and to oust this Court of its jurisdiction.

The facts surrounding the "consummation" of the merger at issue are clearly set out in the papers filed in conjunction with Phototron's

efforts, ultimately unsuccessful, to obtain a stay or recall of the Fifth Circuit's mandate pending filing of Phototron's Petition for Writ of Certiorari in this Court. These facts are as follows:

(1) On March 28, 1988, the Fifth Circuit issued its decision reversing the injunction granted by the United States District Court for the Northern District of Texas, Forth Worth Division. At the same time, unknown to the parties, the Fifth Circuit ordered that its mandate should issue forthwith.

(2) Later that same day, in ignorance of the Fifth Circuit's order issuing the mandate, respondent Eastman Kodak Company ("Kodak") served and filed its own motion to have the mandate issue forthwith.

(3) On March 29, 1988, Phototron advised both Kodak and the clerk of the Fifth Circuit that Phototron opposed Kodak's motion, intended to file a Petition for Writ of Certiorari with this Court on April 4, 1988, and would move the Fifth Circuit and this Court for an order staying the mandate pending Phototron's Petition for Writ of Certiorari. The clerk of the Fifth Circuit assured Phototron that the Fifth Circuit would take no action on Kodak's motion for issuance of the mandate until the clerk's office received Phototron's papers in opposition, which the clerk's office permitted Phototron to file on March 30, 1988. Phototron in fact filed its papers on that date.

(4) On March 30, 1988, the office of the clerk of the Fifth Circuit advised Phototron, for the first time, that the Fifth Circuit had ordered the mandate to issue forthwith, *sua sponte*, on March 28, 1988. The clerk then advised Phototron that the Fifth Circuit would treat Phototron's opposition and motion for stay of mandate as a motion to recall the mandate.

(5) Wholly unknown to Phototron, respondents had learned on March 29 of the court's *sua sponte* order that the mandate issue forthwith. On March 29, respondents initiated the actions they contend have consummated their merger.

(6) At the time respondents "consummated" their merger, they knew of Phototron's efforts to stay or recall the Fifth Circuit's mandate.

(7) At the time respondents "consummated" their merger, the mandate of the Fifth Circuit had **not** been received by the United

States District Court for the Northern District of Texas. In fact, the district court did not receive the mandate until April 1, 1988. Thus, at the time respondents "consummated" their merger, the district court's injunction was still in full force and effect.

(8) On March 31, 1988, the Fifth Circuit advised Phototron that the Fifth Circuit had denied Phototron's motion to recall the mandate. That same day, Phototron made application to Justice Byron R. White of this Court to stay or recall the Fifth Circuit's mandate. Justice White granted Phototron's application.

(9) On April 1, 1988, respondents petitioned Justice White to reconsider his order recalling the mandate. The ground urged by respondents was that they had already consummated the merger at issue, and Phototron's petition was moot. Justice White then vacated his order recalling the mandate. Thereafter, Phototron unsuccessfully sought reconsideration from Justice William J. Brennan, who denied Phototron's reapplication on April 4, 1988.

On the basis of the foregoing facts, all undisputed, respondents cannot credibly claim that this action is moot, that Phototron cannot obtain review in this Court, and that this Court lacks power to review this case and provide appropriate relief. At the time respondents "consummated" their merger, they did so knowing full well that Phototron not only was seeking to enjoin the merger, but also was doing everything possible to stay or recall the mandate, and that the district court had not yet received and made the mandate effective.

In characterizing such conduct, certain terms spring inevitably to mind. The Oxford English Dictionary provides the following definition of the term "railroad," used as a verb:

> *U.S.* To accomplish (an action) with great speed; to "rush" (a person or thing) *to* or *into* a place, *through* a process, etc.
>
> *1884 Amer. Law Rev. in Law Times LXXVII. 104/2* The way men are railroaded to the gallows in that country. *1898 Educat. Rev. (U.S.) XV. 465* This process of railroading a pupil through school.

The Compact Edition of the Oxford English Dictionary, vol. II, at 2407 (23rd ed. 1984). This term can find no better application than

to the facts of this case. Indeed, fittingly, if not ironically, the decisions of this Court establishing the clear illegality of the merger at issue are the four railroad cases, decided by this Court in the formative years of the antitrust laws: *Northern Secur. Co. v. United States*, 193 U.S. 197 (1904); *United States v. Union Pac. Ry.*, 226 U.S. 61 (1912); *United States v. Reading Co.*, 253 U.S. 26 (1920); and *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922).

More important, as a legal matter, the actions of respondents are a nullity. They "consummated" their merger at a time when, as a matter of law, the mandate of the Fifth Circuit was not effective, and the injunction prohibiting the merger was still in effect in the district court. For, as this Court has expressly stated, a mandate from a court of appeals does not become effective until received and implemented in and by the district court. *Hartford-Empire Co. v. United States*, 324 U.S. 570, 573 (1945).

In its petition, as a reason for granting the petition, Phototron has urged this Court to grant certiorari "to preserve and encourage continued private enforcement of the antitrust laws." The conduct of respondents after the Fifth Circuit's decision does not damp the urgency of the need for certiorari in this case. It intensifies that need. If antitrust defendants can frustrate the rights of plaintiffs to obtain this Court's review, and preempt this Court's power to grant review and relief, by illegally rushing into the very conduct under challenge as violative of the antitrust laws, then private enforcement of Sections 7 and 16 of the Clayton Act is indeed at an end. Phototron respectfully prays that this Court not permit such a dire result to eventuate.

Finally, the conduct of respondents presents this Court with yet another reason to grant certiorari, beyond the issues in the petition and the importance of showing antitrust violators that they may not so cavalierly oust this Court of its jurisdiction. The "consummation" of the merger at issue here raises the question whether a private plaintiff may obtain divestiture under Sections 7 and 16. This is an issue on which the circuits have divided. *Compare Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.) (no private divestiture), *cert. denied*, 469 U.S. 1036 (1984); *Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674 (9th Cir.) (same), *cert. denied*, 429 U.S. 940 (1976); *with Cia. Petrolera Caribe, Inc. v. Arco*

Caribbean, Inc., 754 F.2d 404 (1st Cir. 1985) (allowing private divestiture); *NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975) (same), *vacated on other grounds*, 429 U.S. 477 (1977). This division warrants this Court's attention and guidance. *See* Sup. Ct. R. 17.1(a).

On the basis of the foregoing arguments and authorities, as well as those in Phototron's original petition, Phototron respectfully requests this Court to grant the writ of certiorari.

Respectfully submitted this 4th day of May, 1988.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
ALIOTO & ALIOTO
BISHOP, PAYNE, LAMSENS
& BROWN

Counsel for Petitioner

DANIEL R. SHULMAN
JOSEPH M. ALIOTO
RICHARD LEE BROWN

APPENDIX F

PHOTOTRON CORPORATION,
Plaintiff-Appellee,

vs.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC.,
and COLORCRAFT CORPORATION,
Defendants-Appellants.

No. 88-1128.

United States Court of Appeals,
Fifth Circuit

March 28, 1988.

Appeals from the United States District Court
for the Northern District of Texas

Before BROWN, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Eastman Kodak Company ("Kodak"), Fuqua Industries and Colorcraft Corporation appeal the granting of a preliminary injunction against Kodak's merger with Colorcraft Corporation, a subsidiary of Fuqua Industries, Inc. After reviewing the record and carefully considering the arguments presented by the parties, we reverse the order of the district court.

Facts

The defendants in this action, Colorcraft and Kodak, have reached an agreement to combine their photofinishing facilities throughout the United States. Colorcraft operates forty-one film processing plants, and Kodak has fifty such labs. The plaintiff in this suit, Phototron, processes film at nine plants in the southern and western United States.

These plants provide processing for amateurs' photographic film; Colorcraft, Kodak and Phototron have accounts with large and small retailers who receive film directly from the public. More than ten years ago, the photo processing market offered consumers two choices: either give film to a retailer who would then send the film to a wholesale processor, or use a mail-order service. The recent appearances of photo minilabs and of a trend toward vertical integration by large retailers such as Eckerd Drugs and Wal-Mart have significantly changed market relationships. Although the parties dispute the proper definition of the relevant market for this antitrust action, certainly many consumers—enjoying the wider range of options brought by advancing technology—have altered the manner in which they have their film processed. The more impatient customers, for example, pay extra for the convenience of having their film back in an hour. In 1980, there were few minilabs in operation; today there are over 12,000. As affidavits in the record show, by 1986 minilabs accounted for thirty percent of the entire value and twenty-two percent of the volume of photofinishing services.

Wholesale labs have had to adapt to these changing market circumstances. Colorcraft now processes most of its orders overnight. Some large general retailers have chosen to integrate by installing minilabs on their premises. Many customers are no longer willing to wait a week for their pictures. Against this backdrop, Kodak and Colorcraft have agreed to merge their photofinishing facilities.

Proceedings

Phototron Corporation brought this action seeking, in part, to enjoin the merger of Kodak's and Colorcraft's photofinishing labs.[1] The district court granted a hearing in early February to consider Phototron's application for a preliminary injunction. At the request of the district court, the merger was postponed until February 23, 1988; and on February 22 the district court granted a preliminary injunction.

The record before the district court consisted of affidavits filed by the parties and the oral arguments heard in early February. In his Memorandum Opinion, Judge Mahon found that:

(1) Phototron has standing to challenge the merger;

(2) wholesale photofinishing is the relevant market;

(3) the merger may substantially lessen competition in the relevant market;

(4) the grant of preliminary injunction is appropriate given the threat of loss and damages Phototron may suffer.

Issues

Kodak challenges the district court's rulings on standing and the relevant market. Our decision on the standing issue, however, forecloses the need to take up the more difficult relevant market issue.

Before setting forth the strict standing requirements, we remind ourselves of a well established principle: a preliminary injunction can be granted only when the district court has found "a substantial likelihood that plaintiff will prevail on the merits." *Canal Authority v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974). One of the merits

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[1] Kodak and Fuqua filed pre-merger notification materials on December 7, 1987 with the FTC and the Antitrust Division of the Justice Department pursuant to the Hart-Scott-Rodino Act. Phototron filed this action on December 21, 1987, three days before the FTC cleared the merger. In its complaint, Phototron alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Section 7 of the Clayton Act. 15 U.S.C. § 18, and state law. For relief, Phototron seeks $100 million in actual damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, and an injunction under Section 16 of the Clayton Act.

issues that must be decided at trial is whether Phototron has suffered an antitrust injury, for without such an injury, Phototron lacks standing to sue. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S.Ct. 484, 491, 93 L.Ed.2d 427, 438 (1986). The district court therefore erred in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likelihood of suffering an antitrust injury. The district court correctly noted that no rigorous proof of antitrust injury was necessary at this early stage of consideration.[2] Given the onerous effects of granting a preliminary injunction, however, more than mere pleading is necessary to establish standing even at this stage. Because the district court determined that the pleadings sufficed standing alone,[3] we must, at the least, remand the case for a determination whether there is a substantial likelihood that Phototron will be able to prove antitrust injury at trial. Given the need for us to render a final decision on this issue, we look beyond a remand and review the record to determine whether we can make the "substantial likelihood" determination ourselves.

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[2]The district court stated:

> Only the issue of **preliminary** injunctive relief is before the Court . . . . Phototron must allege an antitrust injury which flows from the proposed Kodak-Colorcraft combination and sustain only that burden of proof which would entitle it to **preliminary,** not permanent injunctive relief.

Mem. Op. at 15.

[3]The district court initially indicated that it would decide whether Phototron was likely to succeed on the standing issue.

> Phototron has made the requisite allegations in its Complaint and, as will be seen in Part II(b) of this Opinion, made the applicable showing required for equitable injunctive relief.

Mem. Op. at 15–16. Part II(B), however, never addresses the standing issue, but rather focuses only on the likelihood of success on the statutory claims. The merits of any case embody several elements that the plaintiff must prove to prevail at trial. In this case, those elements are: 1) standing, 2) establishing the relevant market, and 3) one or more of the substantive claims (e.g. Clayton Act § 7, Sherman Act §§ 1 and 2).

In *Cargill*, the Supreme Court decided that a competitor could obtain a permanent injunction against a merger by meeting the same standing requirement that the Court articulated earlier in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). *Brunswick* allows treble damage recovery under Section 7 of the Clayton Act only when plaintiffs have shown antitrust injury:

> Plaintiffs must prove **antitrust** injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

429 U.S. at 489, 97 S.Ct. at 697.

This burden on the private plaintiff is a significant one, and the Supreme Court's decision to make it such was aptly noted in Justice Stevens' dissent in *Cargill*:

> This case presents the question of whether the antitrust laws provide a remedy for a private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the post merger conduct of the merging firms and deny relief unless the plaintiff can prove a violation of the Sherman Act. Second, the Court might concentrate on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path.

479 U.S. at ____, 107 S.Ct. at 496, 93 L.Ed. at 443-44. Bound by precedent, we follow the Supreme Court's tracks.

Under *Cargill*, a competitor of two merging entities has standing to challenge the merger if an allegation and proof of predatory pricing is made. In its complaint, Phototron alleges that Kodak and Colorcraft have provided photofinishing services at below cost; specifically, the complaint asserts that the companies have been operating their wholesale labs "unprofitably or at substantially reduced profit

margins for at least the short term, until plaintiff is forced to go out of business or sell to defendants or their surrogates." "Operating . . . at substantially reduced profit margins," however, is not equivalent to pricing in a predatory manner; it is simply pricing in a competitive manner. An allegation that one is operating "unprofitably" comes close to alleging predatory pricing.[4] We withhold a determination of how precisely predatory pricing must be alleged in order to assert an antitrust injury, turning instead to the easier conclusion that Phototron has not demonstrated a substantial likelihood of prevailing on its allegation at trial.

Phototron alleges carefully that Kodak and Colorcraft were operating unprofitably because they "have charged prices for photofinishing services to actual and potential retail customers of plaintiff that are substantially below the prices **plaintiff** can charge and still operate profitably" (emphasis added). The sentence's conclusion does not, of course, necessarily follow from its stated premises. To satisfy the "substantial likelihood" requirement for preliminary injunctive relief, Phototron must present some evidence that Kodak or Colorcraft has sold photofinishing services below **its** cost. In his affidavit, the president of Phototron asserts that Kodak and Colorcraft have been able to undercut the price Phototron offers retailers by "operating at a loss, or [ ] receiving discounts from Kodak on color print paper or chemicals." This "evidence"—sufficient in form for this matter in limine—merely restates the allegation. It affords no showing that Kodak or Colorcraft are actually doing that which Phototron suspects they are doing. To the contrary, Phototron offered evidence of Colorcraft's profitability in 1986, and the price of

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[4] Kodak urges us to find that "operating unprofitably" is not sufficient for asserting predatory pricing. Our Circuit defines predatory pricing as pricing below marginal or average variable cost. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984). The Supreme Court has not given a pinpoint definition of predatory pricing; it has thus far settled for the vague term "pricing below cost."

developing through Kodak labs is among the highest in the industry.[5] We see no likelihood that Phototron would prevail on the merits of its predatory pricing allegation; much evidence, however, suggests that it would not. Accordingly, Phototron has failed to establish standing under a predatory pricing theory.

Phototron argues that other evidence of predatory behavior by Kodak and Colorcraft constitutes antitrust injury. Although the district court made no such findings, we shall address Phototron's concerns individually.

1. Threat of Monopolistic Behavior

Phototron boldly asserts that "[t]he competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." This facially sensible proposition has been undermined by *Cargill.* In *Cargill,* the Court required that the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury. Phototron suggests that the merits of the Kodak-Colorcraft merger are an important consideration in determining standing. As its brief forcefully states: "The monopoly created by the combination of the two largest current competitors clearly threatens to destroy any remaining competitors, including Phototron. Certainly the antitrust laws, which prohibit monopolies, allow a competitor that will be destroyed by a monopolist to use those laws for protection." As Justice Stevens noted in his dissent in *Cargill,* however, the Supreme Court will not grant relief if there is simply "a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." 107 S.Ct. at 496, 93 L.Ed. at 444. Therefore, the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.

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[5] Fuqua's 1986 Annual Report — which was submitted in evidence by Phototron —states that "Colorcraft's earnings increased for the fifth consecutive year, up 33% in 1986 and 12% in 1985 . . . . Profit margins as a percentage of sales declined in 1985 because of the acquisition of Berkey operations but improved in 1986 primarily from economies gained by eliminating duplicate expenses of Colorcraft and Berkey."

2. Massive Use of Advertising

Phototron urges us to find that massive use of advertising and promotion by the merging companies will exclude competition. Advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent. "A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2nd Cir. 1979).

Phototron supports its advertising injury assertion by pointing to the "advertising-driven Colorwatch program." Despite its complaints regarding the Colorwatch system,[6] Phototron has failed to provide any evidence showing that it has a substantial likelihood of proving this injury at trial. Colorwatch is **not** advertising by the wholesale photofinishers; it is a marketing program aimed at the public through retailers but undertaken by a supplier of materials to wholesale photofinishers. In this instance, the supplier happens to be Kodak. Phototron certainly would not attempt to stop this merger if Colorwatch were instead a marketing system developed by another supplier of paper and chemicals to wholesale photofinishers. Even more revealing, the success of wholesale photofinishing is not tied to being a participant in Colorwatch: Colorcraft has been enormously profitable in the past few years when it has **not** been a member of the Colorwatch program. Phototron may have a monopoly or price discrimination action against Kodak as a manufacturer of chemicals and paper, but it cannot use the perceived anticompetitive effects of Colorwatch to challenge this merger. Without evidence of how advertising in the wholesale photofinishing industry can act as a barrier to Phototron's participation in the industry, we cannot conclude that Phototron is likely to succeed on this theory of predation.

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[6] "Colorwatch" is a service mark that retailers display indicating that customers may have their film sent to participating Colorwatch processors where film is developed under quality standards on Kodak-brand paper. A Colorwatch wholesale processor must abide by the quality standards set by Kodak and only use Kodak paper and chemicals in its plant. Of course other plants operated by the wholesaler may use any paper and chemicals it chooses, even Kodak supplies. No special discount is given by Kodak on paper and chemicals to Colorwatch participants.

3. Limit Pricing

Setting one's price at a level just below that which a prospective entrant to the market would need to charge in order to sustain a successful entry is often referred to as "limit pricing." As noted in *Dimmitt Agri Industries, Inc. v. CPC Intern, Inc.*, 670 F.2d 516 (5th Cir. 1982), this practice clearly evinces monopolistic intent. In *Dimmitt*, the plaintiffs introduced clear evidence that "the company was out to exclude other competitors from the market." 679 F.2d at 524. Kodak contends that, as a matter of law, a company already competing in an industry can never allege limit pricing in order to establish antitrust injury because "a limit price, like a monopoly price, is still set at a supra competitive level[;] it can never hurt a competitor that is already in the market." We defer judgment on this contention to a later time. Nonetheless, no evidence in the record supports the allegation of limit pricing, and, as we have said above, without more than a mere allegation, Phototron cannot have standing.[7]

4. Independent Carriers

Phototron contends that the merger will deny competitors access to the market by foreclosing access to independent couriers. This argument clearly lacks merit. Although Kodak will be able to suspend its use of much courier service when it combines its operations with Colorcraft, Phototron will suffer no injury. The courier industry requires neither a large capital investment nor a large consumer base. Newspaper delivery boys are as available in Bugtussle, Texas, as they are in Los Angeles, California. Phototron has presented no evidence to the contrary.

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[7]Phototron's president claims that Kodak has stated to some of Phototron's major retail accounts that "Phototron will be sold or will go out of business." This speculation by Kodak is not proof of limit pricing; it may simply be a recognition that Phototron is no longer a viable competitor. Antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

5. Vertical Integration

Kodak's domination of the color film and color print paper and chemicals markets is the final source of injury that Phototron asserts. Phototron argues that Kodak's dominant position in the supply markets will allow it to "manipulate prices and other terms of sale of these products so that independent wholesale photofinishers are at a distinct disadvantage in competing with wholesale photofinishers owned or controlled by Kodak." Phototron's fear of price discrimination is understandable; its attempt to address this fear by stopping this merger is, however, misdirected. If Kodak is manipulating prices on the sale of its paper and chemicals to customers, then a price discrimination suit should be brought against Kodak, not against this merging entity.

Conclusion

Cargill has imposed significant barriers to competitor attempts to enjoin merger transactions. To obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured. Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

Preliminary injunctions are extraordinary remedies. The Supreme Court has recognized the danger of granting injunctive relief to parties who are not injured by a merger. That concern, expressed in *Cargill*, must inform our decision today. The order of the district court is ***REVERSED***.